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A TREATISE
ON
THE LAW
OF
EXECUTORS AND ADMINISTRATORS

BY
THE RIGHT HONOURABLE
SIR EDWARD VAUGHAN WILLIAMS
(LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

ELEVENTH EDITION
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BOOK THE THIRD.

THE DUTIES OF AN EXECUTOR WITH RESPECT TO LEGACIES.

HAVING thus considered the office of an executor in regard to the payment of debts according to the order prescribed by law, it now becomes necessary to treat of the duties which next demand his attention; viz., those which respect the payment of legacies.

A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last Will, wherein no executor is appointed, to be paid or performed by an administrator" (a). Definition of legacy.

CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING A LEGATEE: AND HEREWITH OF REQUESTS TO CHARITABLE USES.

SECTION I.

Who is capable of being a Legatee.

The subject of the present Section has been in some degree anticipated, by the inquiry as to the capability for the office of executor. The same rule applies in both matters, that every person is capable, excepting such as are expressly forbidden (b).

(a) Godolph. Pt. 3, c. 1, s. 1. Where a testator directed that every legatee under his Will should contribute 1*l.* per cent. out of his legacy to Mrs. W. and her children, it was held that specific legatees and annuitants and residuary legatees were bound to contribute: *Ward v. Grey*, 26 Beav. 485.

(b) *Ante*, p. 152.

The principle that a person who is guilty of feloniously killing another cannot take any benefit under that other person's Will is based upon public policy and applies to manslaughter as well as murder (*b*).

Bankrupt.

A bankrupt may be a legatee; but where a legacy belongs to, or is vested in, a bankrupt at the commencement of his bankruptcy, or is acquired by, or devolves on, him before his discharge, it vests in the trustee in his bankruptcy and is divisible amongst his creditors (*c*).

Alien.

An alien may be a legatee (*d*).

Subscribing witness.

1 Vict. c. 26.

By stat. 1 Vict. c. 26, s. 15 (which, however, does not extend to any Will made before January 1st, 1838 (*e*)), it is enacted, "that if any person shall attest the execution of any Will (*f*) to whom, or to whose wife or husband, any beneficial (*g*) devise, legacy, estate, interest, gift (*h*), or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby (*i*) given or made, such devise, legacy, estate, interest,

(*b*) *Re Hall*, [1914] P. 1.

(*c*) Bankruptcy Act, 1914, s. 38, replacing Bankruptcy Act, 1883, s. 44. It must be observed, however, that legacies the payment of which is by the terms of the gift made conditional upon the legatee not being or becoming a bankrupt do not in the event of the legatee's bankruptcy pass to the trustee. See *post*, p. 1011.

(*d*) See the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2.

(*e*) Nor does it extend to the Wills of soldiers and sailors: *Re Limond*, [1915] 2 Ch. 240. A legacy to a subscribing witness to a Will of *personalty* before this date is a good legacy: *Brett v. Brett*, 3 Add. 210; *Emanuel v. Constable*, 3 Russ. Ch. C. 436; *Foster v. Banbury*, 3 Sim. 40. Such a legacy would not be good in the case of a Will or codicil of real estate even before the above date: *Brett v. Brett*, *ubi supra*.

(*f*) The word "Will" extends to a codicil, and to an appointment by Will. See sect. 1 of Wills Act.

(*g*) The interest must be a *beneficial* interest to the witness to render the bequest void. Therefore, where an attesting witness was made universal legatee in trust for the testator's widow, it was held that the bequest was not null and void under the statute: *In the goods of Ryder*, Prerog. 2 Notes of Cas. 452; *Cresswell v. Cresswell*, L. R. 6 Eq. 69.

(*h*) A solicitor was one of the attesting witnesses of a Will. The Will declared that he should be entitled to charge and receive payment for all professional business to be done by him under the Will, in the same manner as he might have done had he not been the executor. It was held that he was prohibited by this section from receiving that which was not a debt enforceable at law, but a *beneficial gift* which could only be claimed by virtue of the direction in the Will: *Re Barber*, 31 O. D. 665; *Re Pooley*, 40 O. D. 1.

(*i*) I.e., by the same instrument which is attested. Therefore a bequest of a legacy by a Will is not void because the legatee attests a codicil which gives him nothing; nor does a residuary legatee of a

gift or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband (*k*), be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will."

This clause follows almost verbatim the language of the stat. 25 Geo. II. c. 6, except that the stat. of Geo. II. did not contain the words "or to whose wife or husband" in the earlier part, or the words "or to prove the validity or invalidity thereof," towards the close of the section. Consequently the case of *Doe v. Mills* (*l*), which was decided upon the earlier statute, appears to be an authority applicable to the construction of the statute of Victoria. It was there held by Lord Denman and Bolland, B., as judges of the Court of Common Pleas at Lancaster, that the statute of Geo. II. makes void a devise to

share of a residue lose it by attesting a codicil which, by revoking legacies, increases the residuary share: *Gurney v. Gurney*, 3 Drewr. 208; *Tempest v. Tempest*, 2 Kay & J. 635; *Re Marcus* (1887), 57 L. T. 399; *Re Trotter*, [1899] 1 Ch. 764. A testatrix by her Will gave a share of her residuary real and personal estate to the husband of one of the attesting witnesses of the Will. By a codicil which was attested by other witnesses, the testatrix, after a direction to her executors to allow an extended time for payment of a debt due to her from one of the legatees, confirmed her Will in other respects. It was held that the duly attested codicil had the effect of republishing and incorporating the Will so as to render the gift to the husband valid notwithstanding the attestation of the Will by his wife: *Anderson v. Anderson*, L. R. 13 Eq. 381. See also *Re Trotter*, *ubi supra*, and cf. *Re Elcom*, [1894] 1 Ch. 303.

(*k*) A testator left by Will all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death, and in the event of any of his daughters being married at his wife's decease such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband had been one of the attesting witnesses of the Will. Held that the gift to the daughter was void under this section, but that her children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common: *Re Clark*, 31 C. D. 72; cf. *Jull v. Jacobs*, 3 C. D. 703; *Re Townsend's Estate*, 34 C. D. 357; but see *Aplin v. Stone*, *infra*. Sect. 15 of the Wills Act, though avoiding (*inter alia*) a devise to the wife of an attesting witness, *quoad* her interest, does not strike the devise out of the Will. The Will must therefore be construed before sect. 15 is applied: *Re Townsend's Estate*, *ubi supra*; *Aplin v. Stone*, [1904] 1 Ch. 543.

(*l*) 1 Mood. & Rob. 288.

an attesting witness, although there be three other attesting witnesses to the Will.

And accordingly it was afterwards held, by Wood, V.-C., in *Wigan v. Rowland* (m), in the construction of the statute of Victoria, that where the execution was attested by two marksmen, and signed also by two other persons as witnesses, the signatures of the latter must be deemed to have been affixed likewise in attestation of the Will, and not as merely verifying the attestation of the marksmen; and therefore that a legacy to the wife of one of them failed (n).

Wife of
testator.

It may be observed, that although a man could not before the Married Women's Property Act make a grant to his wife, nor enter into a covenant with her (for such grant would have been to suppose her separate existence, and to covenant with her would have been to covenant with himself), yet he might bequeath anything to her by Will; since that could not take effect till after the coverture was determined by death (o).

Effect of
marriage of a
devisee to one
of attesting
witnesses.

The marriage, after attestation of a Will, of a devisee to one of the attesting witnesses does not affect the validity of the devise (p).

SECTION II.

Bequests to Superstitious and Charitable Uses.

All bequests to *superstitious* uses are illegal and void; but bequests to *charitable* uses are not only legal and valid, but are, in some measure, favoured in our law, provided formerly that they were of personal property, in no way connected with land.

Bequests to
superstitious
uses.

With respect to what shall be regarded as superstitious uses, the effect of the statute 1 Edw. VI. c. 14 (although it relates only to superstitious uses of a particular description, existing at

(m) 11 Hare, 157.

(n) But it has been decided that where a Will has been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person who is also legatee appears at the foot of the Will, the Court will receive evidence to explain why such signature was written, and if it be satisfied that it was not written with the intention of attesting the signature of the deceased, it will order it to be omitted from the probate. In which case the validity of the legacy would not be affected: *In the goods of Sharman*, L. R. 1 P. & D. 661; *Randfield v. Randfield*, 8 H. L. C. 225, 228, note (c).

(o) 1 Black. Comm. 442; Co. Lit. 112.

(p) *Thorpe v. Bestwick*, 6 Q. B. D. 311.

the time it passed) (*q*), has been taken to be, that if any real or personal property whatever shall have been, or shall be, given, assigned, limited, or appointed to have continuance, for ever, or for a time only, towards or for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or other like intent, these and such like gifts and dispositions as these, are to be accounted within the superstitious uses intended to be suppressed by the Act (*r*).

Other bequests to superstitious uses, not mentioned by the Act, are deemed void by the general policy of the law: As a devise for the good of the soul of the devisor (*s*).

So, before the passing of the statute of 2 & 3 Wm. IV. c. 115, it was held that a bequest for the education of persons in the Roman Catholic faith was invalid (*t*). But that statute appears to put persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education and charitable purposes, as Protestant Dissenters: And, therefore, since the passing of the Act (which has been held to be retrospective), a legacy given to trustees to appropriate the money in such way as they may judge best calculated to promote the knowledge of the Roman Catholic

(*q*) See *Cary v. Abbot*, 7 Ves. 495, and *Doe v. Hawthorn*, 2 B. & A. 103.

(*r*) *West v. Shuttleworth*, 2 M. & K. 684. So it was held by Lord Langdale, in *Att.-Gen. v. The Fishmongers' Company*, 2 Beav. 151, that establishments or foundations for securing prayers for the souls of the dead are to be deemed superstitious, and within the statute of Edw. VI. And this decision was affirmed by Lord Cottenham, 5 M. & Cr. 11. See also *Heath v. Chapman*, 2 Drewr. 426.

(*s*) *R. v. Lady Portington*, 1 Salk. 162. However, in *Thornton v. Howe*, 31 Beav. 14, Lord Romilly held that a trust for the promulgation of the doctrines of Joanna Southcote could be supported as a charitable gift as intended for the benefit of the public. Compare *Doe v. Hawthorn*, 2 B. & Ald. 103. Formerly a bequest of a fund to be applied for a Jesuba, or assembly for reading the Jewish law and instructing the people in the Jewish religion, was held invalid: *Da Costa v. De Pas*, Ambl. 228; *Pickering v. Stamford*, 2 Ves. 272, 274, 276; *Moggridge v. Thackwell*, 7 Ves. 36, 76. But in *Straus v. Goldsmid*, 8 Sim. 614, it was held by Sir L. Shadwell, V.-C., that a bequest to make persons professing the Jewish religion observe its rites is good. And now Jewish charities by stat. 9 & 10 Viet. c. 59 (which is retrospective) are placed on the same footing as those of Dissenters: *Re Michel's Trusts*, 28 Beav. 39. A bequest for the propagation of views inconsistent with Christianity is not necessarily invalid: *Re Bowman*, [1917] A. C. 406.

(*t*) *Cary v. Abbot*, 7 Ves. 490.

Christian religion among the poor and ignorant inhabitants of a particular district was held to be valid (*u*).

In Ireland it has been held that bequests to monastic orders are void as contravening 10 Geo. IV. c. 7 (*v*). But in England a bequest to Franciscan Friars has been held to be valid as being an absolute immediate gift to the individual friars of the society at the testator's death (*w*).

Bequests for offering masses for the souls of the dead are now declared to be valid in England (*x*). But in Ireland such bequests have long been held not to be illegal, whether the masses are to be celebrated in public or not (*y*), though it seems that if the masses are to be celebrated by members of a monastic order the gift would be void (*z*).

With respect to bequests relating to Protestant Dissenters, the Court will administer a fund given to maintain a society of Protestant Dissenters promoting no doctrine contrary to law, although such as may be at variance with the doctrine of the Established Church (*a*). So in *The Attorney-General v. Hickman* (*b*), a legacy was established, which was given for encouraging such non-conforming preachers as preach God's word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry who are designed to labour in God's vineyard among the Dissenters, leaving the particular mode to the trustees (*c*).

There is a distinction, with respect to the application of the fund bequeathed, between bequests made in favour of uses comprised within the statute 1 Edw. VI. and bequests of the nature above mentioned, which are merely void as bequests to superstitious uses. That statute provides that the bequests made void

Distinction
between
superstitious
uses within
stat. 1 Edw.
VI. and those
above mentioned
void irre-
spective of it.

(*u*) *West v. Shuttleworth*, 2 M. & K. 684. See further as to Roman Catholic charities, stat. 23 & 24 Vict. c. 134.

(*v*) *Sims v. Quinlan*, 17 Ir. Ch. 43; *Cussen v. Hynes*, [1906] 1 Ir. 539; *Ellard v. Phelan*, [1914] 1 Ir. 76.

(*w*) *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937.

(*x*) *Bourne v. Keane*, [1919] A. C. 815.

(*y*) *O'Hanlon v. Logue*, [1906] 1 Ir. 247.

(*z*) *Burke v. Power*, [1905] 1 Ir. 119.

(*a*) *Att.-Gen. v. Pearson*, 3 Meriv. 353, by Lord Eldon; cited by Lord Cottenham, *West v. Shuttleworth*, 2 M. & K. 684, 696.

(*b*) 2 Eq. Cas. Abr. 193.

(*c*) See further on the subject of bequests relating to Dissenters, *Shore v. Wilson*, 9 Cl. & F. 355; *Att.-Gen. v. Wilson*, 16 Sim. 210; *Shrewsbury v. Hornby*, 5 Hare, 406; *Att.-Gen. v. Lawes*, 8 Hare, 32; *Re Barnett*, 29 L. J. Ch. 871; *Re Hutchinson*, [1914] 1 Ir. R. 271.

by it shall vest in the Crown beneficially (*d*): But where the bequest, although not within the statute, is merely void, as being to superstitious uses, the King shall not take it beneficially; yet if it be of a *charitable* nature, it shall not be so far void, as that it shall result to the heir or next of kin of the testator; but the King, by sign manual directed to the Attorney-General, may order to what charitable purpose it shall be disposed (*e*): Where, however, there is nothing of charity in the object of a legacy, which, not being within the terms of the statute of Edw. VI., fails merely on account of its illegality (as in the instance put above of money to be paid to Roman Catholic priests, in order that the testator's soul may have the benefit of their prayers and masses), the next of kin or residuary legatees, as the case may be, are entitled to the benefit of the failure (*f*).

With respect to bequests to charitable uses, testamentary dispositions to charitable or public purposes of money or other personal estate, not connected with real property, are valid. But with regard to bequests of land, or affecting land, in cases where the testator died on or before 5th August, 1891 (*g*), the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which amends and consolidates the former law (chiefly contained in the Act 9 Geo. II. c. 36), enacts, Part II. (*h*), s. 4, sub-s. (1): "Subject to the savings and exceptions contained in this Act, every assurance of land (*i*) to or for the benefit of

Bequests to charitable uses where death of testator on or before August 5, 1891. 51 & 52 Vict. c. 42 (Mortmain and Charitable Uses Act).

(*d*) Where the gift is for the benefit of the poor, but connected *indivisibly* with superstitious uses, made void by the Act, the whole goes to the Crown: *Att.-Gen. v. Fishmongers' Co.*, 5 M. & Cr. 15, 16.

(*e*) *R. v. Lady Portington*, 1 Salk. 162; *Da Costa v. De Pas*, Ambl. 228, and see *post*, pp. 837, 838. But the testator may prevent the application of this rule by a proviso in his Will that if the trusts should be held void, the trustees should stand possessed in trust for his executors or administrators: *De Themmines v. De Bonneval*, 5 Russ. 288.

(*f*) *West v. Shuttleworth*, 2 M. & K. 684; *Heath v. Chapman*, 2 Drewr. 417.

(*g*) As to Wills of testators dying after this date, see 54 & 55 Vict. c. 73, *post*, p. 827.

(*h*) Part I. of the Act provides by sect. 1 for the forfeiture to His Majesty of land assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from His Majesty or of a statute. Sect. 2 gives power to His Majesty to grant licences in mortmain.

(*i*) "Land" in sect. 10 of this Act was defined as including tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land. But by sect. 3 of the Act of 1891 (54 & 55 Vict. c. 73) that definition was repealed, and now in both Acts "land" includes "tenements and hereditaments corporeal

any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and, unless so made, shall be void (*k*). (2) The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof. (3) The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assurator, or of any person claiming under him." Subsect. (4) permits (provided that the assurance reserves the same benefits to persons claiming under the assurator as to the assurator himself) (i.) the grant or reservation of a peppercorn or other nominal rent; (ii.) the grant or reservation of mines or minerals; (iii.) the grant or reservation of any easement; (iv.) covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land assured as of any other adjacent or neighbouring land; (v.) a right of entry on non-payment of such rent or on breach of any such covenant or provision; and (vi.) any stipulations of the like nature for the benefit of the assurator or any person claiming under him. After a provision as to the consideration where the assurance is made in good faith on a sale, subsect. (6) continues: "If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses." By subsect. (7) "If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least twelve months before the death of the assurator, including

or incorporeal of any tenure, but not money secured on land or other personal estate arising from or connected with land." This exception has been held to cover the case of land devised on trust for sale: *Re Wilkinson*, [1902] 1 Ch. 841; *Re Sidebottom*, [1902] 2 Ch. 389. Cf. *Re Ryland*, [1903] 1 Ch. 467. Metropolitan Consolidated 3½ per cent. Stock was held by Kekewich, J., to confer on the holders an interest in land within the meaning of the repealed section of the Act of 1888: *Re Crossley*, [1897] 1 Ch. 928.

(*k*) This section, so far as it applies to Wills, is inconsistent with and repealed by sect. 5 of the Act of 1891, but remains in force so far as it is applicable to deeds. The devise of a reversionary interest in real estate to a charity is now valid: *Re Hume*, [1895] 1 Ch. 422.

in those twelve months the days of the making of the assurance and of the death." If the assurance is of stock in the public funds there is a like provision for its transfer six months before the death, and by sub-sect. (9) "If the assurance is of land, or of personal estate other than stock in the public funds, it must, within six months after the execution thereof, be enrolled in the Central Office of the Supreme Court of Judicature, unless in the case of an assurance of land to or for the benefit of charitable uses, those uses are declared by a separate instrument, in which case that separate instrument must be so enrolled within six months after the making of the assurance of the land" (*l*).

Part III. sect. 6 of the Act exempts from its provisions, subject to certain limitations (*m*), assurances of land and assurances by will of personal estate to be applied in or towards the purchase of land for the purposes only of a public park, a school-house for an elementary school, or a public museum (*n*): "Provided that a Will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration (*o*), must be executed not less than twelve months before the death of the assurator, or be a reproduction in substance of a devise made in a previous Will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assurator, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed" (*p*). Part II. of the Act (*q*) is not to apply in the case of assurances for the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or their colleges, or to the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars on the foundation of such last-mentioned colleges, or to Keble College (sect. 7) (*r*). The Act does not

(*l*) Sect. 5 gives power to remedy omissions to enrol within the requisite time, and by sect. 10 "assurance" is stated to include "a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, Will, or other instrument; and 'assure' and 'assurator' have meanings corresponding with 'assurance,' and 'Will' includes codicil."

(*m*) In a Will not exceeding twenty acres for a park, two acres for a public museum, and one acre for a schoolhouse.

(*n*) For definitions of these terms, see sect. 6, sub-sect. 4.

(*o*) Defined sect. 10 (iv.).

(*p*) And see 55 Vict. c. 11.

(*q*) Sects. 4 and 5.

(*r*) These exemptions are not affected by the Act of 1891. See sect. 10, *post*, p. 829.

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extend to Scotland or Ireland, nor does it affect the operation or validity of any charter, licence, or custom in force at the passing of the Act (13th August, 1888) enabling land to be assured or held in mortmain (sects. 11 and 12). The Act 53 & 54 Vict. c. 16, provides that Parts I. and II. of the Mortmain and Charitable Uses Act, 1888, shall not apply to assurances of land or personal estate to be laid out in land for the purpose of providing dwellings for the working classes in any populous place (*s*).

Under the repealed Mortmain Act (9 Geo. II. c. 36), as under the Act of 1888, there was no restriction upon any one from leaving a sum of money, or any other estate purely personal, to charitable uses (*t*), yet, not only devises of land, copyhold (*u*) as well as freehold, and bequests of money to be invested in land, were held void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate (*x*), or of money to arise from the sale of real estate (*y*), even though such real estate is partnership property (*z*), or the proceeds of growing

(*s*) The quantity of land that may be assured by Will must not exceed five acres, and the Will must be enrolled within six months after probate. "Populous place" is defined, sect. 1. And see also 55 & 56 Vict. c. 29, s. 10, for a further exemption for land required for Technical and Industrial Institutions. The exceptions, general and special, from the provisions of the Mortmain Act are collected in Chron. Index to the Statutes, 18th edit. pp. 813—815.

(*t*) By Lord Hardwicke, in *Soresby v. Hollins*, Highm. 174; 9 Mod. 221, in which case his Lordship afterwards observed: "As it is often said in old books, that 'I was by at the making of the Act of Parliament, and the meaning and intention of it was then said to be this or that,' so I was by at the making of this statute, and it was at that very time said by the legislators, that it would not hinder any charitable disposition of a personal estate." "There is no prohibition of any amount of testamentary charity confined to pure personal property": *per* James, L. J, in *Attree v. Hawe*, 9 C. D. 337, 345.

(*u*) *Arnold v. Chapman*, 1 Ves. Sen. 108; *Doe v. Waterton*, 3 B. & A. 149.

(*x*) *Arnold v. Chapman*, 1 Ves. Sen. 108. See *Att.-Gen. v. Harley*, 5 Madd. 321; *Brook v. Badley*, L. R. 4 Eq. 106; 3 Ch. 672.

(*y*) *Att.-Gen. v. Weymouth*, Ambl. 20; *Waite v. Webb*, Madd. & Geld. 71. So a legacy payable out of personalty, and of the proceeds of the sale of real estate, cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes. Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personalty available for the charitable bequest: *Brook v. Badley*, L. R. 3 Ch. 672; *Ashworth v. Munn*, 15 C. D. 363; *Re Watts*, 27 C. D. 318; 29 C. D. 947; *Re Dawson*, [1915] 1 Ch. 626, overruling *Re Hill's Trusts*, 16 C. D. 173.

(*z*) *Ashworth v. Munn*, 15 C. D. 363.

crops (*a*), bequests of terms for years (*b*), or of money due on mortgage (*c*), or of money secured on turnpike tolls (*d*), or of money secured upon the poor or county rates (*e*), or by assignment of the rates under a Local Paving and Lighting Act (*f*), or a grant by the Crown of the right to lay chains in part of the river Thames to moor ships (*g*), or of a judgment due to a testator, which, in his lifetime, has been reported, in a creditor's suit, to be an incumbrance affecting the real estate of the debtor (*h*), are void. So, where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money is an interest in land, and the purchase-money will not pass by his Will to the charity (*i*). Nor will the unpaid premium payable for the lease

(*a*) *Symonds v. Marine Society*, 2 Giff. 325.

(*b*) *Att.-Gen. v. Graves*, Ambl. 155; *Att.-Gen. v. Tomkins*, Ambl. 216; *Johnston v. Swann*, 3 Madd. 457. But fixtures in a house will pass by a bequest to a charity: *Ibid.* The case of *Johnston v. Swann*, however, if and so far as conflicting with *Lewis v. Allenby*, L. R. 10 Eq. 668, was treated by the Court of Appeal as overruled in *Re Piercy*, [1898] 1 Ch. 565; *post*, p. 826, n. (*k*).

(*c*) *Att.-Gen. v. Meyrick*, 2 Ves. Sen. 44; *Att.-Gen. v. Caldwell*, Ambl. 635; *White v. Evans*, 4 Ves. 21; *Johnston v. Swann*, 3 Madd. 457 (as to which case see note (*b*), *supra*); *Alexander v. Brame*, 30 Beav. 153; *Re Watts*, 29 C. D. 947, in which case it was held that a sum secured by a mortgage of an interest under a settlement, the funds the subject of which are invested on mortgage of land, confers an interest in land.

(*d*) *Knapp v. Williams*, 4 Ves. 30, note. So as to Harbour Tolls: *Ion v. Ashton*, 28 Beav. 379. These cases, however, were questioned in the case of *Re Christmas*, 33 C. D. 332. But in *Re David*, 43 Ch. D. 27, bonds of the Swansea Harbour Trustees issued under the powers of their Special Act, and which included among other things tolls levied upon persons, cattle, and carriages passing over certain bridges belonging to the trustees, were held to be within the statute, on the ground that the tolls, being paid for passing over the land of the trustees, were an interest in land.

(*e*) *Finch v. Squire*, 10 Ves. 41; *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *Thornton v. Kempson*, Kay, 592. But the authority of these cases has been much shaken since the decision in *Attree v. Hawe*, 9 C. D. 337, which Malins, V.-C., in *Jervis v. Lawrence*, 22 C. D. 202, regarded as overruling them. In the last-mentioned case the Vice-Chancellor decided that an assignment by way of mortgage of a proportion of rates arising under an Improvement Act to secure the repayment of a sum advanced by the assignee did not create an interest in the land within the Act. And see *Re Harris*, 15 C. D. 561; *Re Thompson*, 45 C. D. 161; *Re Parker*, [1891] 1 Ch. 682; *Re Pickard*, [1894] 3 Ch. 704.

(*f*) *Thornton v. Kempson*, Kay, 592. But as to the authority of this case, see *ante*, note (*e*).

(*g*) *Negus v. Coulter*, Ambl. 367.

(*h*) *Collinson v. Pater*, 2 Russ. & M. 344.

(*i*) *Harrison v. Harrison*, 1 Russ. & M. 71. But the arrears of rent due to him at his decease will pass: *Edwards v. Hall*, 11 Hare, 6.

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of a house which is in the nature of purchase-money and for which there is a lien upon the land (*k*). But policies of assurance, by which the directors engage to "pay out of the funds," or "that the funds shall be liable," or that "a share of the funds shall be paid," are not so connected with land as to fall within the Act, although the assets of the assurance company consist partly of real estate. And the rule is the same, though by the policy, sealed with the company's corporate seal, the assured becomes a member (*l*). So it was held that shares in joint-stock companies, as canal, dock, railway, water-works, gas light, and banking companies, and the like, were not within the Georgian statute, notwithstanding real estate forms part of their property (*m*), and whether the company be a corporation or not (*n*). And so of a debenture or bond (not amounting to a mortgage) given by such a company to secure a debt (*o*), and also of debenture stock in such a company (*p*), and so of a sum of money borrowed by justices of the peace under and for the purposes of the Acts 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, and charged by them by a bond upon the police rates, which were not leviable by the justices who, under 7 & 8 Vict. c. 73, could only issue a precept to the guardians (*q*), and of a mere

(*k*) *Shepheard v. Beetham*, 6 C. D. 597.

(*l*) *March v. Att.-Gen.*, 5 Beav. 433.

(*m*) *Thompson v. Thompson*, 1 Coll. 381; *Hilton v. Giraud*, 1 De G. & Sm. 183; *Sparling v. Parker*, 29 Beav. 450; *Walker v. Milne*, 11 Beav. 507 (overruling *Tomlinson v. Tomlinson*, 9 Beav. 459); *Re Langham*, 10 Hare, 446; *Edwards v. Hall*, coram Lord Cranworth, 6 De G. M. & G. 74; *Hayter v. Tucker*, 4 Kay & J. 243; *Re Parker*, [1891] 1 Ch. 682. Surplus lands stock of the Metropolitan Railway was held not to be an interest in land within the Act of 1888: *Re Hollon*, 69 L. T. 425.

(*n*) *Myers v. Perigal*, 2 De G. M. & G. 599. And it makes no difference that the railway has been demised to another company for one thousand years, with power to purchase: *Linley v. Taylor*, 1 Giff. 67.

(*o*) *Walker v. Milne*, 11 Beav. 507; *Bunting v. Marriott*, 19 Beav. 163; *Holdsworth v. Davenport*, 3 C. D. 185; *Re Mitchell's Estate*, 6 C. D. 655. But Hall, V.-C., was of opinion that a gift of Metropolitan Board of Works Consolidated Stock to a charity was void: *Cluff v. Cluff*, 2 C. D. 222; accord., *Re Crossley*, [1897] 1 Ch. 929. So also Manchester Corporation Stock: *Re Holmes*, 63 L. T. 477.

(*p*) *Attree v. Hawe*, 9 C. D. 337.

(*q*) *Re Harris*, 15 C. D. 561. Such a case as this is distinguishable from *Finch v. Squire*, 10 Ves. 41, where the rates were chargeable in respect of the ownership of the land, and could be levied by distress, while in this case the parties who charge the rates have nothing to do with the land, and all that they can do is to call on other persons to pay. See, however, as to *Finch v. Squire*, ante, p. 821, note (*e*).

debt, though in the event it was in part payable out of the proceeds of land (*r*).

The real question is, whether an interest in land is attempted to be given. Thus, in *Attree v. Hawe* (*s*), the question was whether debenture stock gave the holder an interest in land, and the Court of Appeal held that it did not, on the principle that "debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement or hereditament, or any interest in land, tenement or hereditament, or charge or incumbrance affecting land, tenement or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." The question is not whether the interest in land is direct or indirect. There must, however, be an interest, and what is given is not an interest in land merely because the donee may by some legal proceedings acquire an interest in land (*t*).

Again, in *Re Parker* (*u*), where, in the judgment of Stirling, J., the authorities are collected and considered, mortgages issued by the Corporation of Preston as the Local Board of Health, comprising "such proportion of the rents, rates, and water-works," authorised by their Acts as the principal sum bore to the whole sum borrowed, were held not to confer an interest in land, the mortgage debt being consequently pure personality.

The Georgian statute having in terms prohibited bequests of money to be laid out in the purchase of land for any charitable use, it was held that a gift to erect a school, or almshouses, or other building of that kind, is, generally speak-

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(*r*) *Re Robson*, 19 Ch. D. 156.

(*s*) 9 C. D. 337. See also *Re Pickard*, [1894] 2 Ch. 88, aff. [1894] 3 Ch. 704, where debenture stock of the Leeds Corporation charged on rates and the revenues of all landed and other property of the Corporation was held not to be an interest in land within the meaning of the Act.

(*t*) *Re Watts*, 29 Ch. D. 947, which approved the case of *Brook v. Badley*, L. R. 3 Ch. 672; *Re Robson*, 19 C. D. 156 (see *post*, p. 827, *note* (*p*)), where the case of *Jeffries v. Alexander*, 8 H. L. C. 594, was distinguished. The validity of a charitable gift by Will is not affected by the trustees exercising an option to invest in real security: *Re Hamilton*, [1896] 2 Ch. 617.

(*u*) [1891] 1 Ch. 682. The ground of the decision is that the mortgages in question were in substance mortgages of "the undertaking" within the decisions in *Gardner v. London, Chatham & Dover Rail. Co.*, L. R. 2 Ch. 201, and *Holdsworth v. Davenport*, 3 C. D. 185, and not of the specific items of property mentioned.

ing, void, because it involves an express direction to purchase land for that purpose (*x*). Section 6, however, of the Act of 1888 permits a gift of land, not exceeding one acre, for a schoolhouse for an elementary school as defined by that section. So if a testator gives money to legatees, on condition they will provide land for effecting his charitable purpose, the bequest is void: for this is, in substance and effect, a direction to purchase land (*y*).

But (although a bequest of money to *exonerate* lands in mortmain is within the statutes (*z*)) a bequest of money to be applied simply in the *amelioration* of lands in mortmain, or for building upon them, or repairing buildings already erected, was held not within the former statute, the object of which was merely to prevent any addition to the quantity of land already in mortmain (*a*). And in one case, Lord Hardwicke extended this principle so far as to lay down, that a bequest of money for the erection of a school would be good, if a piece of ground, already in mortmain, could be obtained for the purpose (*b*). But that opinion has been overruled by a great

(*x*) A bequest of money to *establish* a school, &c., may, in the proper construction of the Will, bear a similar import: *Att.-Gen. v. Hull*, 9 Hare, 647; *Longstaff v. Rennison*, 1 Drewr. 28; *Re Clancy*, 16 Beav. 295; *Dunn v. Bownas*, 1 Kay & J. 596: though it does not necessarily signify that a school, &c., is to be built: *Att.-Gen. v. Williams*, 2 Cox, 387. Compare *Hawkins v. Allen*, L. R. 10 Eq. 246. But a gift of money for the *support* of a school does not necessarily imply that it is to be laid out in the purchase of lands, &c., so as to be void: *Re Hedgman*, 8 C. D. 156. If the gift is for the "*supporting or founding*" it is an alternative gift, and may be valid as to *supporting*, but void as to "*founding*" the school: *Ibid.* A bequest to endow a church, built or to be built, is valid: *Edwards v. Hall*, 11 Hare, 1, affirmed by Lord Cranworth, 6 De G. M. & G. 74; *Sinnett v. Herbert*, L. R. 7 Ch. 232. A direction to "hire rooms" does not bring a gift within the Mortmain Act: *Re Robson*, 19 C. D. 156.

(*y*) *Att.-Gen. v. Davies*, 9 Ves. 535. See also *Denton v. Lord John Manners*, 25 Beav. 38. So if a testator gives a real estate to A., he paying a sum of money to the executors, who are to apply the residue of the real and personal estate to a charity, the bequest is void, and the money will result to the heir, although the land is well charged: *Arnold v. Chapman*, 1 Ves. 108. Where there was a bequest of leaseholds, on condition to assign part to a charity, Leach, V.-C., held that the legatee took, discharged of the condition: *Poor v. Myal*, Madd. & Geld. 32.

(*z*) *Corbyn v. French*, 4 Ves. 418; *Re Lynall's Trusts*, 12 C. D. 211. So a bequest of a sum of money to pay off a debt secured by an equitable charge only on a meeting-house, is void: *Waterhouse v. Holmes*, 2 Sim. 162.

(*a*) *Att.-Gen. v. Bishop of Chester*, 1 Bro. C. C. 444; *Att.-Gen. v. Munby*, 1 Meriv. 327; *Ingleby v. Dobson*, 4 Russ. Ch. C. 342; *Re Hawkins's Trusts*, 33 Beav. 570; *Champney v. Davy*, 11 C. D. 949.

(*b*) *Att.-Gen. v. Bowles*, 2 Ves. Sen. 547.

number of subsequent decisions, and it is now clearly established, that, in order to make such a bequest valid, the testator must point out the land in mortmain on which the erection is to take place (c). Yet, although it is now perfectly well settled by these decisions, that if a testator gives personal property to erect and endow a school or hospital, it must be considered, unless it be otherwise declared, that it was his intention that land should be acquired, and buildings made, as necessary parts of his purpose; yet if he expressly directs that no part of the money bequeathed is to be so applied, the bequest may be good (d). Thus, in the case of *Philpott v. St. George's Hospital* (e) a testator devised to S. a piece of land in N.: he then declared his desire to erect and endow almshouses in N., and he empowered his trustees, "as soon as land in N. shall have been legally dedicated to charitable uses" by some other person within twelve months after his decease, to pay to the trustees of the intended charity a sum of 60,000*l.*, to be devoted to the purposes of the charity, *but not to be applied to the purchase of lands for the same*. It was held that this bequest was valid (f).

(c) *Att.-Gen. v. Hyde*, Ambl. 751; *Chapman v. Brown*, 6 Ves. 404; *Att.-Gen. v. Davies*, 9 Ves. 544; *Pritchard v. Arbouin*, 3 Russ. Ch. C. 456; *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Giblett v. Hobson*, 5 Sim. 651; affirmed, 3 M. & K. 517; *Dunn v. Bownas*, 1 Kay & J. 596, 601; *Re Watmough's Trusts*, L. R. 8 Eq. 272. In this last case, Malins, V.-C., declined to follow the decision of the M. R. in *Booth v. Carter*, L. R. 3 Eq. 757. The rule is now well settled that in order to validate a gift of this kind, you must find in the Will a reference to an existing site on which the building contemplated shall be erected, or you must find words expressly excluding the application of the money given in the acquisition of land: *Pratt v. Harvey*, L. R. 12 Eq. 544, *per Wickens*, V.-C.; *Re Cox*, 7 C. D. 204; *Hawkins v. Allen*, L. R. 10 Eq. 246.

(d) *Henshaw v. Atkinson*, 3 Madd. 312, by Sir John Leach. As to what is and is not a sufficient direction to exclude the acquisition of land, see *Edwards v. Hall*, 11 Hare, 1, and *Mather v. Scott*, 2 Keen, 172, in which latter case the charitable bequest was accompanied by a wish that the trustees would entreat the lord of the manor to grant some land suitable for the proposed building: and Lord Langdale held that the bequest was void on the ground that there was nothing in the Will which excluded the power of the trustees to buy.

(e) 6 H. L. C. 338.

(f) This case finally settles the law on the subject. It dissents from the decision in *Trye v. Corporation of Gloucester*, 14 Beav. 173, that a charitable gift is void because it manifestly contemplated *not directly but indirectly* the bringing of land into mortmain, and in effect overrules that case. The various decisions on the subject are referred to in detail in these two cases of *Philpott v. St. George's Hospital* and *Trye v. Corporation of Gloucester*.

Bequests with a discretionary power to executors to lay out in land or otherwise:

It has been laid down, that the correct way of judging of a bequest of this kind is to see whether the proper mode of executing the trust would not be to buy land and build thereon the proposed school or other charitable building (*g*). But it must be observed that a charitable bequest is not void because the trustees *may*, under the terms of it, lay out money in purchasing lands without committing a breach of trust: The gift is only void where, from its nature, the money must necessarily be laid out in buying land or for other purposes obnoxious to the Law of Mortmain (*h*). The rule has long been established, that if the words of the Will as to laying out the money in land are mandatory or directory, the bequest is void (*i*); but where the words of the Will leave sufficient room for the Court to say that there is a discretionary power in the trustees to lay out the money either in land or otherwise, the bequest will be good; upon the principle that if the language of a Will is in the disjunctive, and leaves to the executors or trustees two methods to do a particular thing, one lawful and the other prohibited, the lawful bequest shall be preserved and take effect (*k*). Accordingly, in the case of *The Mayor of Faversham v. Ryder* (*l*), a bequest of money to a municipal corporation, to be applied by them in such manner and for such purposes as they should judge to be most for the benefit and ornament of their town, was held valid; for that the gift did not necessarily involve either the purchase of land or expenditure on it, inasmuch as the corporation, in their discretion, might apply the fund for

(*g*) *Re Clancy*, 16 Beav. 295; *Longstaff v. Rennison*, 1 Drewr. 28.

(*h*) *Dunn v. Bownas*, 1 Kay & J. 600, 601, *per* Wood, V.-O.

(*i*) *English v. Ord*, Highm. 181; *Grieves v. Case*, 4 Bro. C. C. 67; *Kirkbank v. Hudson*, 7 Price, 212.

(*k*) *Soresby v. Hollins*, Highm. 175; *Grimmett v. Grimmett*, Ambl. 212; *Curtis v. Hutton*, 14 Ves. 537; *Att.-Gen. v. Goddard*, 1 Turn. & R. 348; *Johnston v. Swann*, 3 Madd. 457; *Edwards v. Hall*, 6 De Gex, M. & G. 74; *Baldwin v. Baldwin*, 22 Beav. 413; *London University v. Yarrow*, 23 Beav. 159; *Hartshorne v. Nicholson*, 26 Beav. 58; *Dent v. Allcroft*, 30 Beav. 335; *Graham v. Paternoster*, 31 Beav. 30; *Re Beaumont's Trusts*, 32 Beav. 191; *Lewis v. Allenby*, L. R. 10 Eq. 668; *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Re Hedgman*, 8 O. D. 156. But see also *Mann v. Burlingham*, 1 Keen, 235; *Att.-Gen. v. Hodgson*, 15 Sim. 156; *Baker v. Sutton*, 1 Keen, 224; *Re Hamilton*, [1896] 2 Ch. 617; *ante*, p. 823, n. (*t*); *Re Piercey*, [1898] 1 Ch. 565. The principle upon which the Court proceeded in *Lewis v. Allenby* is the same as that on which the Court acted in *Mayor of Faversham v. Ryder*, *University of London v. Yarrow*, and *Carter v. Green* (*infra*, n. (*m*)). *Johnston v. Swann* and *Baker v. Sutton*, if and so far as they differ from *Lewis v. Allenby*, must be taken to be overruled.

(*l*) 5 De G. M. & G. 350, affirming the decision of the M. R.: 18 Beav. 318.

purposes of benefit and ornament without contravening the law by either buying land or spending any of the money upon land; and if the law allows one mode of application of a trust fund and disallows another, the trustees must apply the fund in the mode the law allows, and not in that which it prohibits (*m*).

In case of a devise by a freeman of London, of land within the city, the former statute did not apply: for by the custom of London, freemen may devise in mortmain lands within the city (*n*), and by sect. 12 of the Act of 1888 nothing therein shall affect the operation or validity of any charter, licence, or custom in force at the passing of the Act enabling land to be assured or held in mortmain.

In the great case of *Jeffries v. Alexander* (*o*), an instrument under seal contained a covenant with trustees, that the covenantor in his lifetime, or his executors within twelve months after his decease, would invest 60,000*l.* in the names of trustees upon charitable trusts: It was held by the House of Lords that this deed, so far as it was necessary to resort to real estate or estates of a real nature, was void under the statute (*p*).

Covenant to invest upon charitable trusts.

The effect of the Mortmain and Charitable Uses Act, 1888, as respects Wills of testators dying after the 5th August, 1891, has been much altered by the Mortmain and Charitable Uses Act, 1891, which provides:—

54 & 55 Vict. c. 73.

Sect. 3. "Land in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure (*q*), but not money secured on land or other personal estate arising from or con-

Definition of "land."

51 & 52 Vict. c. 42.

(*m*) See also *Church Building Society v. Barlow*, 3 De Gex, M. & G. 120; *Carter v. Green*, 3 Kay & J. 591; *Salisbury v. Denton*, 3 Kay & J. 529; and the cases collected in note (*k*), *supra*.

(*n*) *Middleton v. Cater*, 4 Bro. C. C. 409; Bac. Abr. Customs of London (A.).

(*o*) 8 H. L. C. 594.

(*p*) And see *Fox v. Lowndes*, L. R. 19 Eq. 453. In the later case of *Re Robson*, 19 C. D. 156, a settlor covenanted to pay a sum of money to trustees on certain trusts with remainder as his wife should appoint, and she by deed appointed the same to charitable uses and died before the settlor. The settlor died without having paid the money. It was held that the money was a mere debt from the settlor's estate, and, though it would be payable to the trustees of the charity in part out of the proceeds of land, it was not in any part void. The case of *Jeffries v. Alexander* was much discussed by the learned judges in their judgment in this case and distinguished by them.

(*q*) Leaseholds apparently fall within this definition: *Re Kershaw*, 37 C. D. 674.

needed with land (*r*); and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed."

Meaning of
"assurance."

Sect. 4. "In this Act the word 'assurance' shall have the same meaning as in the Mortmain and Charitable Uses Act, 1888."

Land assured
by Will for a
charitable
purpose to be
sold.

Sect. 5. "Land may be assured by Will to or for the benefit of any charitable use (s), but except as hereinafter provided, such land shall, notwithstanding anything in the Will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners" (*t*).

Land after
expiration of
time limited
for sale to be
sold by order
of Charity
Commis-
sioners.

Sect. 6. "So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the said Commissioners may make any order under their seal directing such trustees to proceed with the sale or completion of the sale of the said land or removing such trustees and appointing others, and may provide by any such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity, and for the payment of the costs and expenses incurred by the said administering trustees in or connected with such sale, and every such order shall be enforceable by the same means and be subject to the

(*r*) Land devised to trustees on trust for sale and to hold the proceeds upon trust for a charity is within this exception, and therefore sect. 5 is not applicable: *Re Wilkinson*, [1902] 1 Ch. 841; *Re Sidebottom*, [1902] 2 Ch. 389; *Re Ryland*, [1903] 1 Ch. 467.

(*s*) An advowson assured upon trusts under which the trustees are not required to do more than the duty of any owner of an advowson, namely, to present a fit and proper person, is not assured "to or for the benefit of any charitable use" within this section: *Re Church Patronage Trust*, [1904] 1 Ch. 41; [1904] 2 Ch. 643.

(*t*) Land assured for technical and industrial institutions under 55 & 56 Vict. c. 29, is excepted from this section by sect. 10 of that Act. See also *supra*, n. (*r*). The Court has jurisdiction under sect. 5, when and so often as the circumstances render it desirable, to extend the time for sale beyond the year from the testator's death; and the power of granting an extension of time is not confined merely to an extension for the purpose of carrying into effect a contract for sale made within the year from the death: *Re Sidebottom*. [1901] 2 Ch. 1.

same provisions as are applicable under the Charitable Trusts Act, 1853, and the Acts amending the same, respectively, to any orders of the said Commissioners made thereunder.” 16 & 17 Vict. c. 137.

Sect. 7. “Any personal estate by Will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses (*u*) as though there had been no such direction to lay it out in the purchase of land.” Personal estate by Will directed to be laid out in land not to be so laid out.

Sect. 8. “It shall be lawful for the High Court or any judge thereof sitting at chambers, or for the Charity Commissioners, if satisfied that land assured by Will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by Will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land” (*x*). Power to retain land in certain cases.

Sect. 9. “This Act shall only apply to the Will of a testator dying after the passing of this Act” (*y*). Application of Act.

Sect. 10. “Nothing in this Act contained shall limit or affect the exemptions contained in Part III. of the Mortmain and Charitable Uses Act, 1888, or apply to any land or personal estate to be laid out in the purchase of land acquired under any assurance to which such exemptions or any of them apply, or shall exclude or impair any jurisdiction or authority which might otherwise be exercised by a Court or judge of competent jurisdiction or by the Charity Commissioners.” Saving.

The Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the pure personal assets, when it would be void by touching an interest in land (*z*). Assets not marshalled in favour of charity.

In the absence of any direction by a testator (dying before

(*u*) The words “charitable uses” here mean “purposes of the charity.” A trust to purchase land and build houses thereon, and let the same at an undervalue to the poor of London and other populous places as a continuing trust, was therefore held a valid charitable gift: *Re Sutton*, [1901] 2 Ch. 640.

(*x*) A certificate of the Charity Commissioners under sect. 17 of the Charitable Trusts Act, 1853, is not required in the case of an application under this section: *Re Church Patronage Trust*, [1904] 1 Ch. 41; [1904] 2 Ch. 643.

(*y*) The Act applies to all cases in which the testator dies after the date of the passing of the Act, whether the Will was made before or after such date: *Re Bridger*, [1893] 1 Ch. 44; [1894] 1 Ch. 297; and see *In the goods of Yates*, [1919] P. 93.

(*z*) See *post*, Pt. iv. Bk. I. Ch. II. § II., as to marshalling.

5th August, 1891) to pay the charitable bequest out of pure personalty, the debts and legacies, as also the costs of the action as between solicitor and client, must be paid out of the pure and impure personalty *pro ratâ* (a).

The rule of the Court applicable to the apportionment of the assets, where a testator has made charitable bequests whether particular or residuary out of a mixed fund, is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail, as would in that way fall to be paid out of the prohibited fund (b). The form of declaration is that the charitable legacies given by the Will ought to abate in the proportion which that part of the testator's personal estate which has arisen from or is connected with land bears to the whole personal estate (c). The proportion in which the bequest fails is to be ascertained according to the state and value of the assets at the testator's death and not at the time of apportionment (d).

But with regard to testators dying after the 5th August, 1891, directions to marshal are unnecessary, since sect. 3 of the Act of 1891 exempts impure personalty from the provisions of the Act of 1888, and by the same section land may be assured by Will for any charitable use, subject as in the Act provided as to sale.

What are
charitable
uses within
the Mort-
main Acts:

It remains to consider what the law deems charitable uses, so as to be subject to the restriction of the Mortmain Acts. Bequests to any of the purposes specified in the statute 43 Eliz. c. 4, or to any purpose of a similar nature (e), were considered as bequests to charitable uses, within the statute 9 Geo. II. c. 36. The statute of 1888 repeals 43 Eliz. c. 4, but by sect. 13 (2), after reciting the preamble to that Act, which mentions gifts for relief of aged, impotent, and poor people, for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, for education and preferment of orphans, for relief, stock or maintenance for houses of correction, for marriages of poor maids,

(a) *Re Clark*, 33 W. R. 516. Cf. *Champney v. Davy*, 11 C. D. 949.

(b) *Per* Lord Cottenham, in *Williams v. Kershaw*, 1 Keen, p. 275, n.

(c) Seton, 7th edit. p. 1307.

(d) *Calvert v. Armitage*, 1 H. & M. 446.

(e) See *Turner v. Ogden*, 1 Cox, 317.

for support, aid, and help of young tradesmen, handieraftsmen and persons decayed, for relief or redemption of prisoners or captives, for aid or ease of any poor inhabitant concerning payment of fifteens, setting out of soldiers and other taxes, it provides as follows: "Whereas in divers enactments and documents reference is made to charities within the meaning, purview and interpretation of the said Act (f): Be it therefore enacted that references to such charities shall be construed as references to charities within the meaning, purview and interpretation of the said preamble."

Under 9 Geo. II. c. 36, not only bequests for the education or relief of the poor, as by means of schools (g) or hospitals (h), or to the poor inhabitants, not receiving alms, of a particular parish (i), or to the widows and children of the seamen belonging to a particular place (k), but also all bequests for public purposes, whether local or general (l), were held bequests to charitable uses. So the Royal Society and the Royal Geographical Society are charitable institutions (m), as are the Society

(f) *I.e.*, 43 Eliz. c. 4.

(g) *Att.-Gen. v. Hyde*, Ambl. 750; *Att.-Gen. v. Nash*, 3 Bro. C. C. 588, subject to sect. 6 of the Mortmain Act, 1888.

(h) *Masters v. Masters*, 1 P. Wms. 420; *Pelham v. Anderson*, 1 Bro. C. C. 444, note; *Foy v. Foy*, 1 Cox, 163. It was decided in *Burnaby v. Barsby* (4 H. & N. 690) that a conveyance of land to churchwardens and overseers of a parish for the purpose of building a workhouse under powers conferred on them by sect. 8 of 59 Geo. III. c. 12, was not within the description of charitable uses as enumerated in the statute of 43 Eliz. Kay, J., however, in *Webster v. Southey* (36 C. D. 9), seemed to think this decision difficult to reconcile with a series of decisions in equity cited in his judgment.

(i) *Att.-Gen. v. Clarke*, Ambl. 422.

(k) *Powell v. Att.-Gen.*, 3 Meriv. 48. See also *Att.-Gen. v. Comber*, 2 Sim. & Stu. 93. As to the cases where bequests to poor relations are considered as bequests to charitable uses, see *White v. White*, 7 Ves. 423; *Att.-Gen. v. Price*, 17 Ves. 371; *Gillam v. Taylor*, L. R. 16 Eq. 581. See and compare *Isaac v. Defriez*, Ambl. 599; and *Att.-Gen. v. Northumberland*, 7 C. D. 745.

(l) See *Att.-Gen. v. Pearce*, 2 Atk. 88; *Att.-Gen. v. Corporation of Shrewsbury*, 6 Beav. 220. In *Pemsel's Case*, [1891] A. C. at p. 583, it is stated by Lord Macnaghten that "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads." In Theobald on Wills, 7th edit. at p. 351 *et seq.*, the cases may be found classified with reference to these divisions. Every object of general public utility is not necessarily a charity. See *Re Macduff*, [1896] 2 Ch. 451; *Re Verrall*, [1916] 1 Ch. 100. Consequently, a gift for encouraging undertakings of general utility "is not a charity": *Kendall v. Grainger*, 5 Beav. 300.

(m) *Beaumont v. Oliveira*, L. R. 6 Eq. 534; 4 Ch. 309.

for the Protection of Animals liable to Vivisection and the Home for Lost Dogs (*n*), the International Society for the Total Suppression of Vivisection (*o*), and the Royal General Theatrical Fund Association (*p*). So also a bequest to the British Museum (*q*), or for the improvement of a particular city (*r*), or for the establishment of water-works for the use of the inhabitants of a particular town (*s*), or of a perpetual botanical garden for the public benefit (*t*); and, likewise, bequests for the promotion of the Protestant religion, as for the advancement of the Christian religion among infidels (*u*), or of the religious doctrines of any particular sect or person, provided they are not of an immoral tendency (*x*), or to the poor and the service of God (*y*), or for the establishment of a preacher in a particular chapel (*z*), or for the benefit of the poor dissenting ministers residing in any of the counties of England (*a*), or a bequest for keeping in repair the fabric or the ornaments of a parish church, or a memorial window, or a monument *in it*, or the parish churchyard (*b*), or for the repair of a parsonage (*c*), or a bequest of an annual sum to the clerk of the parish to keep the chimes in repair, to play certain psalms (*d*), or to the vicar

(*n*) *Re Douglas*, 35 C. D. 472.

(*o*) *Re Foveaux*, [1895] 2 Ch. 501. See also *Re Cranston*, [1898] 1 Ir. 431, where the gift was to a vegetarian society.

(*p*) *Spiller v. Maude*, 32 C. D. 158, n.; *Re Lacy*, [1899] 2 Ch. 149.

(*q*) *British Museum v. White*, 2 Sim. & Stu. 594.

(*r*) *Howse v. Chapman*, 4 Ves. 542; *Mitford v. Reynolds*, 1 Phil. Ch. C. 185; *Mayor of Faversham v. Ryder*, 18 Beav. 318; 5 De G. M. & G. 350; *Re Allen*, [1905] 2 Ch. 400.

(*s*) *Jones v. Williams*, Ambl. 651; *Att.-Gen. v. Heelis*, 2 Sim. & Stu. 67; *Att.-Gen. v. Eastlake*, 11 Hare, 205.

(*t*) *Townley v. Bedwell*, 6 Ves. 194.

(*u*) *Att.-Gen. v. Virginia College*, 1 Ves. 243.

(*x*) *Thornton v. Howe*, 31 Beav. 14, where the trust was for publishing and propagating the sacred writings of Joanna Southcote.

(*y*) *Re Darling*, [1896] 1 Ch. 50.

(*z*) *Grieves v. Case*, 4 Bro. C. C. 67; *S. C.*, 1 Ves. 548; *Thorner v. Wilson*, 3 Drewr. 245; 4 Drewr. 350. But see *Doe v. Aldridge*, 4 T. R. 264; *Doe v. Copestake*, 6 East, 323.

(*a*) *Waller v. Childs*, Ambl. 524; *Att.-Gen. v. Fowler*, 15 Ves. 85. See also *Att.-Gen. v. Lawes*, 8 Hare, 32.

(*b*) *Hoare v. Osborne*, L. R. 1 Eq. 585; *Re Pardoe*, [1906] 2 Ch. 184. But a gift for the perpetual repair of a grave or vault *not within* the church is not a charitable legacy: *Ibid.*; *Re Vaughan*, 33 C. D. 187; *Re Rogerson*, [1901] 1 Ch. 715; and see *post*, p. 835. See also *Re Manser*, [1905] 1 Ch. 68, as to a legacy for the repair of burial grounds to be used by members of the Society of Friends only being a good charitable legacy, apart from the question of public benefit; *Re Douglas*, [1905] 1 Ch. 279.

(*c*) *Att.-Gen. v. Chester*, 1 Bro. C. C. 444.

(*d*) *Turner v. Ogden*, 1 Cox, 316; *Re Pardoe*, [1906] 2 Ch. 184.

or curate of a particular place, for preaching an annual sermon on a certain day (*e*), or to build a village club to be maintained for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing (*f*), or to build an organ gallery in a parish church (*g*), or to be paid on a certain day to the singers sitting in the gallery of the church (*h*), or for a regimental mess (*i*), or for the benefit of animals (*k*), or for a home for nurses (*l*), or for the relief of indigent bachelors (*m*), were deemed bequests to charitable uses within the Statute of Mortmain. The same has been held of a gift "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit" (*n*); and of a gift for the increase and encouragement of good servants (*o*).

A bequest for a religious purpose is *primâ facie* a bequest for charitable purposes (*p*). But a bequest for "charitable or religious" purposes is void for uncertainty (*q*).

A pious use is not necessarily a charitable use (*r*). Where the gift is not charitable and tends to a perpetuity, it is void, but the rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another (*s*); consequently, although a gift for the repair of a

(*e*) *Soresby v. Hollins*, Highm. 174; *S. C.*, 9 Mod. 221; *Durour v. Motteux*, 1 Ves. Sen. 320; *Turner v. Ogden*, 1 Cox, 316.

(*f*) *Re Scowcroft*, [1898] 2 Ch. 638.

(*g*) *Adnam v. Cole*, 6 Beav. 353.

(*h*) *Turner v. Ogden*, 1 Cox, 316.

(*i*) *Re Donald*, [1909] 2 Ch. 410.

(*k*) *Re Wedgwood*, [1915] 1 Ch. 113.

(*l*) *Re Webster*, [1912] 1 Ch. 106.

(*m*) *Weir v. Crum Brown*, [1908] A. C. 162.

(*n*) *Whicker v. Hume*, 14 Beav. 509; 1 De G. M. & G. 506; 7 H. L. C. 124. A bequest of money "for some one or more purposes, charitable, philanthropic or _____," is not bad simply by reason of the existence of the blank, but must be treated as one for charitable or philanthropic purposes, and since there may be philanthropic purposes which are not charitable, it is not a good charitable bequest: *Re Macduff*, [1896] 2 Ch. 451. And cf. *Re Verrall*, [1916] 1 Ch. 100, and *Re Hunter, Hood v. Att.-Gen.*, [1899] A. C. 309; *post*, p. 838.

(*o*) *Loscombe v. Wintringham*, 13 Beav. 87. A great many authorities on this subject will be found collected in the reporter's note to the above case. See also *Heath v. Chapman*, 2 Drewr. 417.

(*p*) *Arnott v. Arnott*, [1906] 1 Ir. R. 127; *O'Hanlon v. Logue*, [1906] 1 Ir. 247.

(*q*) *Grimond v. Grimond*, [1905] A. C. 124.

(*r*) *Heath v. Chapman*, 2 Drewr. 417.

(*s*) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206, 211; *Re Tyler*, [1891] 3 Ch. 252. This principle does not, however, extend to cases where an immediate gift in

family vault in a cemetery is void, yet a gift to the trustees of a charity with a gift over to another charity, on the first donees failing to repair the family vault, is good (*t*).

Before the statute 43 Geo. III. c. 107, bequests to the corporation of Queen Anne's bounty, for the augmentation of poor vicarages (*u*), or small livings (*x*), were held to be charitable bequests (*y*); but by the provisions of that statute, a devise of real estate, as well as of any goods and chattels, for the benefit of Queen Anne's bounty, is rendered valid.

Again, bequests for building churches are regarded as charitable uses (*z*). But by statute 43 Geo. III. c. 108, it is enacted, that all persons may, by Will executed three months at least before death, bequeath all their estate in real property, not exceeding five acres, or goods and chattels, not exceeding in value 500*l.*, for the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the Liturgy of the Church of England shall be used, or any mansion-house for the residence of any minister of the Church of England officiating in such church or chapel, or any out-buildings, churchyard or glebe for the same respectively (*a*). The Act proceeds to provide that any gift, exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition: And that no glebe containing upwards of fifty acres shall be augmented by more than one acre (*b*).

favour of private individuals is followed by an executory gift in favour of charity, or where an immediate gift in favour of charity is followed by an executory gift in favour of private individuals: *Re Bowen*, [1893] 2 Ch. 491.

(*t*) *Re Tyler*, [1891] 3 Ch. 252.

(*u*) *Widmore v. Woodroffe*, Ambl. 636.

(*x*) *Middleton v. Clitherow*, 3 Ves. 734.

(*y*) In these cases bequests of money were held void, on the ground that the corporation was bound by its rules to lay it out in land.

(*z*) *Pritchard v. Arbouin*, 3 Russ. Chanc. C. 456. See *Doe v. Hawthorn*, 2 B. & A. 96.

(*a*) *Champney v. Davy*, 11 C. D. 949; *O'Brien v. Tyssen*, 28 C. D. 372. See *Dixon v. Butler*, 3 Y. & Coll. 677. A gift of the proceeds of land is not within the protection of this Act: *Incorporated Church Building Society v. Coles*, 5 De G. M. & G. 324. Where a gift of pure and impure personalty is made to trustees to erect or endow a church they are entitled, under the 43 Geo. III. c. 108, to 500*l.* out of the impure personalty as well as to all the pure personalty: *Sinnett v. Herbert*, L. R. 7 Ch. 232; *Champney v. Davy*, *ubi supra*. The restriction as to amount is repealed: *Re Douglas*, [1905] 1 Ch. 279.

(*b*) It is also provided by sect. 1 that the Act shall not extend to enable any person within age or of non-sane memory, nor women covert without their husbands, to make any such gift, grant or aliena-

A bequest of money, to be raised out of real estate for the purpose of erecting a monument to the testator's memory, is not a charitable use (*c*). Nor is a trust to repair, and, if need be, rebuild, a vault and tomb for the testator and his family (*d*). And it is established that a gift merely for the purpose of keeping up a tomb or a building, which is of no public benefit, and only an individual advantage, is not a charitable use but a perpetuity, and therefore void (*e*).

Again, a gift to one of the chartered companies in the city of London for an increase of their stock of corn for the service of the market in London, is a donation for the benefit of the company and its revenues, and not a charitable use (*f*). Whether a bequest to a friendly society in aid of its funds is or is not a bequest to charitable uses seems to depend on the objects of the society. The relief of poverty and suffering would seem to be a necessary object of the association to constitute a charity (*a*).

With regard to the exception in favour of the Universities, and the colleges of Eton, Winchester, and Westminster, it was under the Georgian statute held that the legislature meant to except such devises only as were really and *bonâ fide* for the benefit of the colleges, and not those in which the legal interest only passes to the college, in trust for other charitable purposes (*b*).

The exceptions of the statute :

as to the Universities and certain colleges :

tion. This proviso has been held not to be affected by the provisions of sect. 1, sub-sect. 1 of the Married Women's Property Act, 1882: *Re Smith's Estate*, 35 C. D. 589.

(*c*) *Mellick v. The Asylum*, 1 Jacob. 180; *Adnam v. Cole*, 6 Beav. 353. See *Mitford v. Reynolds*, 1 Phil. C. C. 185; 16 Sim. 105.

(*d*) *Doe v. Pitcher*, 6 Taunt. 359. However, Lord Ellenborough expressed an opinion that, although it was not a charitable use, with respect to the party's own interment, it was so with respect to that of his family. *Sed quære*, and see *infra*, note (*e*).

(*e*) *Thompson v. Shakespear*, 1 Joins. 612; *Carne v. Long*, 2 De G. F. & J. 75; *Rickard v. Robson*, 31 Beav. 244; *Hoare v. Osborne*, L. R. 1 Eq. 585; *Dawson v. Small*, L. R. 18 Eq. 114; *Re Williams*, 5 C. D. 735; *Re Birkett*, 9 C. D. 576; *Re Vaughan*, 33 C. D. 187; *Re Rogerson*, [1901] 1 Ch. 715. *Secus*, as to a tomb or monument *within the church*: *Hoare v. Osborne*, *ubi supra*, ante, p. 832.

(*f*) *Att.-Gen. v. Haberdashers' Co.*, 1 Mylne & K. 420.

(*a*) *Re Clark's Trusts*, 1 C. D. 497; *Pease v. Pattinson*, 32 C. D. 154; *Cunnack v. Edwards*, [1896] 2 Ch. 679; *Re Buck*, [1896] 2 Ch. 727. Cf. *Re Clarke*, [1901] 2 Ch. 110.

(*b*) *Att.-Gen. v. Tancred*, 1 Eden, 15; *Att.-Gen. v. Munby*, 1 Meriv. 327. See also *Att.-Gen. v. Whorwood*, 1 Ves. Sen. 534. It was said by Lord Northington, in the *Att.-Gen. v. Tancred*, that the exception extends only to colleges established in the University at the time of the statute; but this distinction was doubted by Lord Loughborough: *Att.-Gen. v. Bowyer*, 3 Ves. 728.

bequests of
land in
Scotland,
Ireland or the
Colonies :

bequests of
proceeds of
land, &c., to
be laid out in
Scotland :

cases of
bequests to
legatees,
accompanied
by bequests
to charity :

The Act of 1888 does not extend to Scotland or Ireland (sect. 11), nor, as it is local, will it extend to prohibit dispositions of real estate, or personal property connected with real estate, in the West Indies, or other colonies (*c*). But bequests of personal estate, connected with real estate in England, to be laid out in land in Scotland, Ireland, &c., for charitable uses were, prior to the Act of 1891, held void (*d*). And in the case of *Att.-Gen. v. Mill* (*e*), where a Scotchman, by Will in the English form, made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust, to lay out the same in the purchase of lands, or rents or inheritance in fee simple, for the intent expressed in an instrument of even date with his Will; and by that instrument he directed the trustees of his Will to pay the rents annually to certain other trustees who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town: it was holden by Lord Lyndhurst, and afterwards by the House of Lords, that the bequest was void.

It is necessary to advert to a class of bequests on which the Georgian statute was held not to operate. This class consists of cases where there is a bequest to particular legatees, to which the statute does not apply, accompanied by a disposition void by the operation of the statute: In these cases the rule is, that if the two objects are not inseparably blended, the bequest in favour of the unobjectionable purpose will be supported, although the charitable disposition shall fail (*f*): but if the unobjectionable bequest be so mixed up with the purpose of the charity, as to be dependent on it, the bequest must be considered indivisible and void (*g*).

(*c*) *Att.-Gen. v. Stewart*, 2 Meriv. 143. Nor to the East Indies: *Mayor of Lyons v. East India Co.*, 1 Moo. P. C. 175, 298; *Mitford v. Reynolds*, 1 Phil. Ch. C. 185, 192; *Whicker v. Hume*, 7 H. L. C. 124.

(*d*) *Curtis v. Hutton*, 14 Ves. 537.

(*e*) 3 Russ. Ch. C. 328; 5 Bligh, N. C. 593; 2 Dow & Cl. 393. The gift would have been good if the trustees had had an option of buying the lands, &c., either in Scotland or in England. Cf. *Canterbury Corp'n. v. Wyburn*, [1895] A. C. 89.

(*f*) *Blandford v. Fackerell*, 4 Bro. C. C. 394; *Doe v. Aldridge*, 4 T. R. 264; *Att.-Gen. v. Stepney*, 10 Ves. 22; *Waite v. Webb*, Madd. & Geld. 71; *Doe v. Pitcher*, 6 Taunt. 359; *Doe v. Wrighte*, 2 B. & A. 710; *Doe v. Harris*, 16 M. & W. 517.

(*g*) *Durour v. Motteux*, 1 Ves. Sen. 323; *Att.-Gen. v. Gouldiny*, 2 Bro. C. C. 428; *Att.-Gen. v. Whitchurch*, 3 Ves. 141; *Att.-Gen. v.*

A gift over to take effect if the previous gift should be adjudged void by the Law of Mortmain, is valid (*h*).

Gift over if the previous gift should be void under the statute.

Bequests to charitable uses, made void by the statute, devolve on the testator's heir (*i*), or his next of kin (*k*), or the residuary legatees, according to the nature of the property bequeathed, and the language of the Will (*l*).

On whom the bequests void by the statute devolve.

It must be observed in conclusion, that purposes of liberality and benevolence, or *private* charity, do not amount to "charitable uses," in the sense in which that expression is used in the Courts of Law and Equity, with reference to the present subject: Thus, a bequest in trust for such objects of "benevolence and liberality" as the trustee in his own discretion shall most approve (*m*), is not a legacy to a charitable use. So it was held by the Court of King's Bench (*n*), that a devise to trustees of a reversion in land, to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should think fit to apply the same, was not a devise to charitable uses within the stat. 9 Geo. II. c. 36. Again, a bequest for such "benevolent purposes" as the trustees in their integrity and discretion may agree on (*o*), or "to be given in private charity" (*p*) is not to be considered a bequest to charitable uses (*q*).

Indefinite bequests for liberal or benevolent purposes, or private charity, not charitable uses.

Davies, 9 Ves. 535; *Att.-Gen. v. Hinxman*, 2 Jac. & Walk. 170; *Limbrej v. Gurr*, Madd. & Geld. 151. See also *Morice v. Bishop of Durham*, 10 Ves. 538; *Mitford v. Reynolds*, 1 Phil. Ch. C. 185, 196; 16 Sim. 105; *Smith v. Oliver*, 11 Beav. 481; *Re Cox*, 7 C. D. 204.

(*h*) *Carter v. Green*, 3 Kay & J. 591; *Warren v. Rudall*, 4 K. & J. 603; *Hall v. Warren*, 9 H. L. C. 420.

(*i*) *Arnold v. Chapman*, 1 Ves. Sen. 108; *Gibbs v. Rumsey*, 2 V. & B. 294.

(*k*) *Howse v. Chapman*, 4 Ves. 542.

(*l*) Cf. *ante*, p. 508; *Cooke v. Stationers' Company*, 3 Myln. & K. 262; *Henchman v. Att.-Gen.*, 3 M. & K. 485.

(*m*) *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522. In *Re Best*, [1904] 2 Ch. 354, a gift to the corporation of Birmingham in aid of "such charitable and benevolent institution" as they should in their discretion think fit was held to be a good charitable gift; following the decision of Pearson, J., in *Re Sutton*, 28 C. D. 464, where the words of the Will were, "in charitable and deserving objects."

(*n*) *Doe v. Copestake*, 6 East, 328.

(*o*) *James v. Allen*, 3 Meriv. 17. As to cases where the disposition of a fund for charitable purposes is left to the discretion of legatees in trust, see *Waldo v. Caley*, 16 Ves. 206; *Down v. Worrall*, 1 M. & K. 561; *Horde v. Lord Suffolk*, 2 M. & K. 59; *Ellis v. Selby*, 1 Mylne & Cr. 286; *Nightingale v. Goulburn*, 5 Hare, 484; 2 Phil. Ch. C. 594; *Townshend v. Carus*, 3 Hare, 257; *Kendall v. Granger*, 5 Beav. 300; *Salisbury v. Denton*, 3 Kay & J. 529; *Wilkinson v. Lindgren*, L. R. 5 Ch. 570; *Re Piercy*, [1898] 1 Ch. 565.

(*p*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260. See also *Vezey v. Jamson*, 1 Sim. & Stu. 71; *Nash v. Morley*, 5 Beav. 177.

(*q*) *Thomas v. Howell*, L. R. 18 Eq. 198.

This distinction is attended with important consequences, inasmuch as the rule is completely established, that where a *charitable* purpose (in the technical sense) is expressed, however general, the bequest shall not fail on account of the uncertainty or failure of the object; but the particular mode of application will be directed by the King's sign manual in some cases, in others by the Court of Chancery (*r*). But where a bequest is for a purpose of liberality or benevolence, or private charity or philanthropy (*s*), not amounting to a "charitable use," and is of a nature so general and undefined as to be incapable of being executed by the Court, it fails altogether, and the heir-at-law, the next of kin, or residuary legatee, as the case may be, becomes entitled to the property (*t*), as in the case of bequests void by the statute.

Bequests for charitable and non-charitable purposes.

Where a bequest is made for charitable and other purposes not charitable, the law is thus stated by Lord Davey in *Hunter v. Att.-Gen.* (*u*): "There are two classes of authorities. On

(*r*) By Sir Wm. Grant in *Morice v. Bishop of Durham*, 9 Ves. 405; *Simon v. Barber*, 5 Russ. 112; *Hayter v. Trego*, 5 Russ. 113; *Bennett v. Hayter*, 2 Beav. 81; *Att.-Gen. v. Lawes*, 8 Hare, 32; *Loscombe v. Wintringham*, 13 Beav. 87. The distinction seems to be that, where there is a general indefinite charitable purpose, not fixing itself on any particular object, the disposition is in the King by the sign manual; but where the gift is to trustees, with general or some objects pointed out, which fail, the Court will take upon itself the execution of the trust: *Ommanney v. Butcher*, 1 Turn. & Russ. 270; *Moggridge v. Thackwell*, 7 Ves. 36; *Att.-Gen. v. Gladstone*, 13 Sim. 7; *Reeve v. Att.-Gen.*, 3 Hare, 191; *Pocock v. Att.-Gen.*, 3 C. D. 342; *Wilkinson v. Lindgren*, L. R. 5 Ch. 570; *Re Jarman's Estate*, 8 C. D. 584. See *per* Buckley, J., in *Re Davis*, [1902] 1 Ch. at p. 888. For cases where the Court executed the trust *cy-près*, see *Att.-Gen. v. Ironmongers' Co.*, 2 M. & K. 576; *Att.-Gen. v. Boulton*, 2 Ves. 380; *Hayter v. Trego*, 5 Russ. 113; *Mayor of Lyons v. Adv.-Gen. of Bengal*, 1 App. Cas. 91; *Biscoe v. Jackson*, 35 C. D. 460; *Re Slevin*, [1891] 2 Ch. 236, reversing *Stirling, J.*, [1891] 1 Ch. 373; *Re Davis*, [1902] 1 Ch. 876; *Re Mann*, [1903] 1 Ch. 232; *Re Cunningham*, [1914] 1 Ch. 427. For cases where the Court would not execute the trust *cy-près*, see *Cherry v. Mott*, 1 M. & Cr. 123; *Clarke v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowland*, 3 Giff. 617; *New v. Bonaker*, L. R. 4 Eq. 655; *Re Prison Charities*, L. R. 16 Eq. 129; *Fisk v. Att.-Gen.*, L. R. 4 Eq. 521; *Re Ovey*, 29 C. D. 560; *Re White's Trusts*, 33 C. D. 449; *Re Rymer*, [1895] 1 Ch. 19; *Re Joy*, 60 L. T. 175.

(*s*) *Re Macduff*, [1896] 2 Ch. 451.

(*t*) *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522; *James v. Allen*, 3 Meriv. 17; *Ommanney v. Butcher*, 1 Turn. & Russ. 260; *Vezey v. Jamson*, 1 Sim. & Stu. 71; *Fowler v. Garlike*, 1 Russ. & M. 232; *Ellis v. Selby*, 1 M. & Cr. 286; *Williams v. Kershaw*, 5 Cl. & F. 111; *Kendall v. Granger*, 5 Beav. 300; *Dolan v. Macdermot*, L. R. 5 Eq. 60; L. R. 3 Ch. 676.

(*u*) [1899] A. C. 309, at p. 323. The decision of the House of Lords in this case restored that of *Romer, J.*, [1897] 1 Ch. 518.

the one hand, there is a long series of cases extending from *Morice v. Bishop of Durham* (*v*), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (*x*), decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent,' or 'charitable or philanthropic,' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty.

"On the other hand, it has been decided in cases such as *Att.-Gen. v. Doyley* (*y*) and *Salisbury v. Denton* (*z*) that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally.

"A third class of cases was relied on by the Attorney-General, of which *Sinnett v. Herbert* (*a*) and *In re Douglas, Obert v. Barrow* (*b*), are examples, in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternate modes of application is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable."

It will be seen in the foregoing pages that bequests are sometimes void by reason of their falling within the Mortmain Statute, and sometimes by reason of the uncertainty of the bequest or the failure of the object, and that generally when the bequest is wholly void the heir-at-law or next of kin or residuary legatee, as the case may be, becomes entitled to the property. Sometimes, however, questions arise by reason of the bequest being held only partially void, and in such cases

Bequests partially void

(*v*) 9 Ves. 399; 10 Ves. 321.

(*x*) [1896] 2 Ch. 451; *Re Sidney*, [1908] 1 Ch. 488.

(*y*) (1735). 4 Vin. Abr. 485; 7 Ves. 58, n.

(*z*) 3 K. & J. 529.

(*a*) L. R. 7 Ch. 232.

(*b*) 35 O. D. 472.

the rule would seem to be, that if the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail for uncertainty (c). But where there is a gift of money on trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, if the first gift fails, the whole income falls into the surplus, and that whether or not you can fairly ascertain what is the extreme sum required for the first purpose. The real question in these cases is whether on the true construction of the gift the trust for the application of the income is to be a charge on the whole income and the residue is to be given to the charitable purpose (d), the principle being that only so much of the fund as is required for the illegal purpose is to be abstracted, and the gift for the illegal purpose being void none is required, and consequently the entire fund remains applicable to the valid purpose.

Immediate charitable bequest not invalid by reason of time of particular application directed being indefinite.

Where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all (e). Where, therefore, a testatrix directed that as soon as land should be given for the purpose moneys bequeathed by her should be expended in the erection of almshouses in three specified places, it was held that this was not a conditional gift to charity (f), but was an immediate gift, and an inquiry was directed whether any land had been given or rendered available for the purposes intended (g).

(c) See Jarm. on Wills, 6th edit. 228, 469, and cases below in n. (d).

(d) *Magistrates of Dundee v. Morris*, 3 Macq. 134; *Fisk v. Att.-Gen.*, L. R. 4 Eq. 521; *Dawson v. Small*, L. R. 18 Eq. 114; *Re Williams*, 5 C. D. 735; *Re Birkett*, 9 C. D. 576; *Re Vaughan*, 33 C. D. 187; *Re Rogerson*, [1901] 1 Ch. 705; cf. *Chapman v. Brown*, 6 Ves. 404; *Fowler v. Fowler*, 33 Beav. 616; *Cramp v. Playfoot*, 4 K. & J. 479.

(e) *Per* Lord Macnaghten, *Wallis v. Sol.-Gen. for New Zealand*, [1903] A. C. 173, 186; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Re University of London, &c.*, [1909] 2 Ch. 1.

(f) See *Cherry v. Mott*, 1 My. & Cr. 132, as to conditional legacies to charities.

(g) *Chamberlayne v. Brockett*, *ubi supra*, following *Sinnett v. Herbert*, L. R. 7 Ch. 232.

CHAPTER THE SECOND.

THE CONSTRUCTION OF WILLS.

SECTION I.

General Rules of Construction.

IT is obviously not within the scope of this Treatise to enter fully into the general doctrine of the construction of Wills. It may, however, be useful to state briefly some of the most important rules which have been established upon this subject. And it may also be expedient to prefix a statement of the general principle on which Wills are to be expounded.

The question in expounding a Will is not what the testator meant, but what is the meaning of his words: The use of the expression, that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means: The Will must be expressed in writing, and that writing only is to be considered. And in construing that writing, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it (*a*).

(*a*) *Abbott v. Middleton*, 7 H. L. C. 114, by Lord Wensleydale; *Gordon v. Gordon*, 5 H. & C. 254. Where the words of a Will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable; but where they are capable of two interpretations that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result: *Bathurst v. Errington*, 2 App. Cas. 698. A testator must not be presumed to intend an absurdity; nevertheless, if shown by the context or by the whole Will to have so intended, the intention, if not illegal, must be carried

1. Technical words not necessary.

1. Technical words are not necessary to give effect to any species of disposition (*b*). Therefore, where the testator used the words "all my *personal* estates," and it was clear beyond all doubt upon the face of the Will that the testator meant by these words, not what is technically understood by them, but the *real* property over which he had an absolute personal power of disposition, it was holden that the freehold passed by this description (*c*). So on the other hand, if on the whole Will it clearly appears that the testator's intention was to bequeath leasehold property, in which he had a chattel interest only, under the description of his *real* estate, such intention shall be carried into effect (*d*).

2. Technical words to be taken in their legal sense.

2. Nevertheless, if technical words are used by the testator, he will be presumed to employ them in their legal sense, unless the context contained a clear indication to the contrary (*e*).

out: *Rhodes v. Rhodes*, 7 App. Cas. 192. See as to the use to be made by the Court of previous decisions on other Wills, *Greville v. Browne*, 7 H. L. C. 703; *Re Morgan*, [1893] 3 Ch. 222, 228; *Re Bawden*, [1894] 1 Ch. 693, 697; *Re Stone*, [1895] 2 Ch. 193, 200, 201.

(*b*) By Lord Kenyon, in *Hay v. Coventry*, 3 T. R. 86.

(*c*) *Doe v. Tofield*, 11 East, 246; *Roe v. Pattison*, 16 East, 221; *Doe v. Haslewood*, 6 A. & E. 167; *Doe v. Pratt*, *ibid.* 180. So "all" has been held to pass real estate: *Re Shepherd*, [1914] W. N. 65. And the words "all the rest" have been held to pass real, as well as personal, property, although there was no prior mention of realty in the Will: *Attree v. Attree*, L. R. 11 Eq. 280; cf. *Smyth v. Smyth*, 8 C. D. 561; and see *Re Willatts*, [1905] 1 Ch. 378.

(*d*) *Hobson v. Blackburn*, 1 Mylne & K. 571; *Goodman v. Edwards*, 2 Mylne & K. 759; *Read v. Backhouse*, 2 Russ. & M. 546; *Doe v. Cranstoun*, 7 M. & W. 1; *Swift v. Swift*, 1 De G. F. & J. 160. A testator devised a farm by the description "my freehold farm and lands situate at E." The Will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold. It was held that the copyhold parts of the farm passed under the devise: *Re Bright Smith*, 31 C. D. 314. In this case *Hall v. Fisher*, 1 Coll. 47, and *Stone v. Greening*, 13 Sim. 309, were distinguished on the ground, *inter alia*, that in those cases there was a residuary devise, and there was no room for the operation of the presumption that one who has gone through the form of making a Will does not intend to die intestate. See *Re Harrison*, 30 C. D. 390, 393. By the 26th section of the Wills Act a general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands. As to the construction of this section, see *Butler v. Butler*, 28 C. D. 66.

(*e*) *Lane v. Lord Stanhope*, 6 T. R. 352, by Lord Kenyon; *Phillips v. Garth*, 3 Bro. C. C. 68, by Buller, J.; *Buck v. Norton*, 1 Bos. & Pull. 57, by Eyre, C. J.; *Smith v. Butcher*, 10 C. D. 113, 116; *Keay v. Boulton*, 25 C. D. 212; *Re Fraser*, [1904] 1 Ch. 111, 117; *Re Simcoe*, [1913] 1 Ch. 552. A testator devised "all real estate of which he might die seised." It was held that "seised" being a purely technical word must be construed according to its technical meaning: *Leach v. Jay*, 6 C. D. 493; 9 C. D. 42. In construing, however, the autograph Will of an illiterate man, the usual meaning of technical language may

“If words of art,” said Lord Alvanley, in *Thellusson v. Woodford* (*f*), “are used, they are construed according to the technical sense, unless upon the whole Will it is plain that the testator did not so intend.” Courts, therefore, have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law (*g*). But where the intention of the testator is plain, it will be allowed to control the legal operation of words however technical (*h*).

The rule above stated has been carried so far, that, in some instances, the testator has been presumed to use words and forms of expression in the sense which they have acquired by decided cases, although such sense be different from their ordinary and natural meaning (*i*).

But it has been laid down by high authority that in construing a Will of personal property, the terms that are used in the Will are to be construed according to the ordinary acceptance of language in the transactions of mankind (*k*).

It may be useful, in this place, to advert to the well-known principle, that where there is a general intent, and a particular one, the particular is to be sacrificed to the general intent (*l*): Which doctrine, perhaps, when rightly understood, amounts to no more than an example of the rule now under consideration, viz., that technical words, or words of known legal import, shall have their legal effect, unless, from subsequent inconsistent

Where there is a general intent and a particular intent, the particular is to be sacrificed to the general.

be disregarded, but no word which has a clear and definite operation can be struck out: *Hall v. Warren*, 9 H. L. C. 420. Where a testator in a foreign Will expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed: *Studd v. Cook*, 8 App. Cas. 577; *Bradford v. Young*, 26 C. D. 656.

(*f*) 4 Ves. 329; and see *post*, p. 874, note (*x*).

(*g*) By Buller, J., in *Hodgson v. Ambrose*, Dougl. 341. See also *Milnes v. Slater*, 8 Ves. 306; *Doe v. Perratt*, 6 M. & Gr. 342, *per* Parke, B.; *Towns v. Wentworth*, 11 Moo. P. C. 543, *per* Lord Kingsdown.

(*h*) *Vauchamp v. Bell*, Madd. & Geld. 343; 6 Cruise's Dig. 148, 3rd edit.

(*i*) *Baines v. Dixon*, 1 Ves. Sen. 41; *Wilmot v. Wilmot*, 8 Ves. 10.

(*k*) By Lord Lyndhurst, in *Parker v. Marchant*, 1 Phil. Ch. C. 360: approved by Wood, V.-C., Kay, 375; *Re Bedson's Trusts*, 28 C. D. 523, 525, *per* Brett, M. R.

(*l*) *Robinson v. Robinson*, 1 Burr. 38; *Jesson v. Wright*, 2 Bligh, 49; *Doe v. Harvey*, 4 B. & C. 620. Cf. *per* Knight-Bruce, J., in *Key v. Key*, 4 D. M. & G. 73, 84.

words, it is *very clear* that the testator meant otherwise (*m*). For instance, if the testator bequeaths real property to a man and the *heirs of his body*, or to a man for life, with a subsequent limitation to the heirs of his body, this creates an estate tail according to the clearly established rules of law; and, therefore, the estate tail so created shall not be cut down into an estate for life, although the Will contains subsequent words expressive of an intention that the heirs of the body of the devisee shall take *as tenants in common* (*n*). It is true that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that the heirs of the body should take, because they cannot take in the mode prescribed: This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired (*o*). The particular intent, then, that the heirs of the body should take as tenants in common, must be sacrificed to the general intent that there should be an estate tail; and therefore the words "as tenants in common" may be rejected (*p*). Nevertheless the words "heirs of the body" will yield to a *clear* particular intent, that the estate should be only for life (*q*).

3. Construc-
tion must be
on the whole
Will:

3. The construction of the Will is to be made upon the entire instrument, and not merely upon disjointed parts of it: and consequently all its parts are to be construed with reference to

(*m*) By Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 56, 57; *Jenkins v. Hughes*, 8 H. L. C. 571; *Doe v. Gallini*, 5 B. & Adol. 621; *Lees v. Moseley*, 1 Y. & Coll. 589; *Toller v. Attwood*, 15 Q. B. 929, 954; *Towns v. Wentworth*, 11 Moo. P. C. 543, *per* Lord Kingsdown; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93. And cf. *Re Richardson*, [1904] 1 Ch. 332.

(*n*) *Jesson v. Wright*, 2 Bligh, 1; *Doe v. Featherstone*, 1 B. & Adol. 944. See also *Reece v. Steele*, 2 Sim. 233; *Mortimer v. West*, 2 Sim. 274; *Ward v. Bevil*, 1 Younge & Jerv. 512; *Jack v. Fetherston*, 9 Bligh, 238; *Dunk v. Fenner*, 2 Russ. & M. 566; *Douglas v. Congreve*, 1 Beav. 59; *Tate v. Clarke*, 1 Beav. 100; *Roddy v. Fitzgerald*, 6 H. L. C. 823. See also the matter discussed in *Van Grutten v. Foxwell*, [1897] A. C. 658.

(*o*) By Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 57.

(*p*) See *Doe v. Harvey*, 4 B. & C. 610.

(*q*) By Lord Eldon, in *Jesson v. Wright*, 2 Bligh, 53; *Jordan v. Adams*, 6 C. B. N. S. 748; 9 C. B. N. S. 483. See also *Jenkins v. Hughes*, 8 H. L. C. 571; *Gummoe v. Howes*, 23 Beav. 184. As to controlling the *primâ facie* meaning of the word "issue," by the context, see the cases collected *post*, p. 876 *et seq.*

each other (*r*). So the language of the Will ought to be construed with reference to the codicil; and *vice versâ* (*s*).

Hence, general words in one part of a Will may be restrained in cases where it can be collected from any other part of the Will, that the testator did not mean to use them in their general sense (*t*).

Hence, also, generally speaking, if the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears a clear intention to the contrary (*u*). But this rule does not preclude the Court from putting a different construction upon the same words, even though used only once in a Will, when applied to different subject-matters. Thus, in *Forth v. Chapman* (*x*), where the testator devised real and personal estate to A., and if he should die, and *leave no issue of his body*, then to B.; Lord Macclesfield said, that it might be reasonable enough to take the same words as to the different estates of realty and personalty in different senses, and as if repeated by two several clauses; and that the words "leave no issue," as applied to the *personal* estate, should be taken to mean, leave no issue *at the time of his death*, but as applied to the freehold to mean an *indefinite failure of issue*: And this case has been considered as an authority in many subsequent instances for

same words
occurring
more than
once:

(*r*) *Turpine v. Forreyner*, 1 Bulst. 101; *Re Bedson's Trusts*, 28 C. D. 523, 525, *per* Brett, M. R.

(*s*) *Darley v. Martin*, 13 C. B. 683; *Hartley v. Tribber*, 16 Beav. 510. See also *Cator v. Cator*, 14 Beav. 463. A codicil is to be taken as a component part of the Will: see *ante*, p. 5. In construing a Will containing an ambiguity, the Court may, for the purpose of explanation, refer to a recital in a codicil, unless it is obviously erroneous: *Re Venn*, [1904] 2 Ch. 52, following *Darley v. Martin*, *ubi supra*, and *Grover v. Raper*, 5 W. R. 134. If there were an obviously erroneous recital of the Will in the codicil, that would not alter the construction of the Will: *Skerratt v. Oakley*, 7 T. R. 492.

(*t*) *Strong v. Teatt*, 2 Burr. 912; *Doe v. Reade*, 8 T. R. 122; *Whitmore v. Trelawney*, 6 Ves. 130; *Crone v. Odell*, 1 Ball & Beat. 466.

(*u*) *Whitmore v. Craven*, 2 Chanc. Cas. 169; *Dalzell v. Welch*, 2 Sim. 319; *Ridgeway v. Munkittrick*, 1 Dr. & W. 93, *per* Sugden, C.; *Rhodes v. Rhodes*, 27 Beav. 413. See also *per* Lord Cairns in *Hill v. Crook* (L. R. 6 H. L. 283, 285). See, however, *Edyvean v. Archer*, [1903] A. C. 379, 384. See also *Re Birks*, [1900] 1 Ch. 417, "Whenever in a deed, or Will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear": *per* Lindley, M. R., *ibid.* 418.

(*x*) 1 P. Wms. 667.

a different construction of the same words in a Will as applied to different subjects (*y*).

when one bequest construed with reference to another.

It must be further observed, that where there is no connection by grammatical construction, or direct words in reference, or by the declaration of some common purpose, between distinct bequests in a Will, the rule now under consideration will not justify the drawing in aid the special terms of one bequest to the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and, although there is no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view (*z*).

The tendency, however, of modern decisions (and good sense appears to require it) is to read the different clauses in the Will referentially to each other, unless they are clearly independent (*a*).

4. Effect must be given to every word:

4. The Court is bound to give effect to every word of the Will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole Will taken together (*b*). Thus, if one devises land to A. B. in fee, and afterwards in the same Will devises the same land to C. D. for life, both parts of the Will shall stand; and in the construction of law, the devise to C. D. shall be first (*c*). But where it is impossible to form one consistent whole, the separate parts being *absolutely* irreconcilable, the latter will prevail (*d*).

if two parts are irreconcilable, the latter will prevail.

(*y*) *Sheffield v. Lord Orrery*, 3 Atk. 288; *Stafford v. Buckley*, 2 Ves. Sen. 180; *Southby v. Stonehouse*, 2 Ves. Sen. 616; *Doe v. Smith*, 5 M. & S. 131, 132; *Doe v. Ewart*, 7 A. & E. 636, 659. See also *Carter v. Bentall*, 2 Beav. 551; *Byng v. Lord Stafford*, 5 Beav. 558; *Head v. Randall*, 2 Y. & Coll. Ch. C. 231; *Buckle v. Fawcett*, 4 Hare, 536, 542; and cf. *Reay v. Boulton*, 26 C. D. 212.

(*z*) *Spirt v. Bence*, Cro. Car. 368; *Right v. Compton*, 9 East, 267; *Chambers v. Brailsford*, 18 Ves. 368. But where there is a clear omission in a Will reference may be made to a similar gift in the same Will to assist in ascertaining what the omission is: *Mellor v. Daintree*, 33 C. D. 198. And see *Gittings v. McDermott*, 2 M. & K. 69.

(*a*) *Ford v. Ford*, 6 Hare, 492, by Wigram, V.-C.

(*b*) *Gray v. Minnethorpe*, 3 Ves. 105; *Constantine v. Constantine*, 6 Ves. 102; *Doe v. Rawding*, 2 B. & A. 448; *Hall v. Warren*, 9 H. L. C. 420.

(*c*) *Anon.*, Cro. Eliz. 9; *Doe v. Davies*, 4 M. & W. 599.

(*d*) *Constantine v. Constantine*, 6 Ves. 100; *Doe v. Biggs*, 2 Taunt. 109; *Sim v. Doughty*, 5 Ves. 243; *Wykham v. Wykham*, 18 Ves. 421; *Sherratt v. Bentley*, 2 Mylne & K. 149; *Morrall v. Sutton*, 1 Phillim. Ch. C. 533. See also 4 Beav. 478; 5 Beav. 100; *Shipperdson v. Tower*, 1 Y. & Coll. O. C. 441.

It must not, however, be understood, that because the testator uses in one part of his Will words having a clear meaning in law, and in another part, words inconsistent with the former, that the first words are to be cancelled or overthrown (*e*). A contrary principle is now fully established in the doctrine already considered, that the general intent, although first expressed, shall overrule the particular (*f*).

The Court is also bound to assume that all documents admitted to probate are testamentary and to construe them in order to ascertain the testator's intention (*g*).

5. The Will must be most favourable and benignly expounded to pursue, if possible, the intention of the testator (*h*).

To effectuate, therefore, the clear intention, as apparent upon the whole Will, clerical errors may be corrected (*i*), and words and limitations may be transposed (*j*), supplied (*k*), or re-

5. Words may be transposed, supplied, or rejected, to advance the apparent intention :

(*e*) By Lord Redesdale in *Jesson v. Wright*, 2 Bligh, 56.

(*f*) *Ante*, p. 843.

(*g*) *Re Barrance*, [1910] 2 Ch. 219.

(*h*) Touchst. 434; 2 Black. Com. 381. Thus, where a testator by his Will gave a legacy of 7,000*l.* upon trust for the benefit of his married daughter and her children; and after reciting that he had given a bond for 3,000*l.* for her husband he directed that what should remain due on the bond at his death should be paid out of the legacy: and by a codicil made about twelve months afterwards, the testator recited that he had paid the 3,000*l.* and other sums for which he was bound for the husband to an amount exceeding 5,000*l.* on the whole, and directed that, unless that sum at least should be repaid previously to his decease, the sum of 5,000*l.* should be taken in part payment of the 7,000*l.* And it was admitted that the husband had not repaid 5,000*l.* It was held that the testator intended that what at his decease should be due to him in respect of these sums should to an extent not exceeding 5,000*l.* be deducted from the daughter's legacy, and an account was directed of the amount remaining unpaid of sums advanced by the testator for the daughter's husband: *Re Taylor's Estate*, 22 C. D. 495; *Re Kelsey*, [1905] 2 Ch. 465. Cf. *Re Aird's Estate*, 12 C. D. 291; *Re Wood*, 32 C. D. 517.

(*i*) *Re Northen's Estate*, 28 C. D. 153, where by an obvious error the words "Lea Knowl Estate" had been inserted by mistake for "Croxton Estate." See also *Re Dayrell*, [1904] 2 Ch. 496, where the word "or" was read "of": *Re Mayell*, [1913] 2 Ch. 488.

(*j*) *Hudson v. Bryant*, 1 Coll. 681.

(*k*) *Doe v. Micklem*, 6 East, 486, 493, 494; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Montagu v. Nucella*, 1 Russ. Chanc. Cas. 171, 172; *Abbott v. Middleton*, 21 Beav. 143; 7 H. of L. 68. But see the observations of Wood, V.-C., in *Hope v. Potter*, 3 Kay & J. 206, 209; *Mellor v. Daintree*, 33 C. D. 198. In *Re Redfern*, 6 C. D. 133, it was held that a clause must have been accidentally omitted, and that the Will ought to be read and construed as if such a clause were contained in it. See also *Re Hunt*, 62 L. T. 753; *Phillips v. Rail*, 54 W. R. 517.

jected (*l*). But the rule is, that words in a Will are not to be rejected or supplied, unless there cannot be any rational construction of the words as they stand (*m*), or the rejection or insertion is necessary to carry out the manifest intention of the Will (*n*).

“or” construed “and,”
and *vice versâ* :
“if” construed
“when :”
“paid” construed
“payable :”
“leaving” construed
“having”
or “having had :”

So, in order to advance the apparent intention of the testator, “or” may be construed “and” (*o*) and *vice versâ* (*p*), in cases of legacies, as well as devises of real estate. So “if” may be construed “when” for the same purpose (*q*). So, upon the whole context, the word “paid” may be construed “payable” or “vested” (*r*). And the words “leaving” any child may be construed “having” or “having had” (*s*). And the word

(*l*) *Jesson v. Wright*, 2 Bligh, 1; *Sherratt v. Bentley*, 2 Mylne & K. 149. Thus the words of a previous bequest will not be affected by an erroneous reference to it in a later part of the Will: *Re Duke*, 16 C. D. 112.

(*m*) By Lord Eldon, in *Chambers v. Brailsford*, 19 Ves. 654; *S. C.*, 2 Meriv. 25; *Peacock v. Stockford*, 3 De G. M. & G. 73, 77; *Pride v. Fooks*, 3 De G. & J. 252.

(*n*) *Sweeting v. Prideaux*, 2 C. D. 413. See also *per* Knight-Bruce, L. J., in *Key v. Key*, 1 De G. M. & G. 73, 84; and Lord Kingsdown in *Towns v. Wentworth*, 11 Moo. P. C. 526, 543.

(*o*) *Richardson v. Sprag*, 1 P. Wms. 434; *Eccard v. Brooke*, 2 Cox, 213; *Lachlan v. Reynolds*, 9 Hare, 796; *Bentley v. Meech*, 25 Beav. 197; *Greated v. Greated*, 26 Beav. 621; *Greenway v. Greenway*, 2 De G. F. & J. 128; *Johnson v. Simcock*, 7 H. & N. 344; *Re Crutchley*, [1912] 2 Ch. 335. The construction of “and” for “or” was not allowed in *Gittings v. McDermott*, 2 M. & K. 69; *Mortimer v. Hartley*, 6 Exch. 60; *Barker v. Young*, 33 Beav. 353; *Blundell v. Chapman*, 33 Beav. 648; *Cooke v. Mirehouse*, 34 Beav. 27; *Holland v. Wood*, L. R. 11 Eq. 91; *Wingfield v. Wingfield*, 9 C. D. 658.

(*p*) *Hetherington v. Oakman*, 2 Y. & Coll. C. C. 299; *Stapleton v. Stapleton*, 2 Sim. N. S. 212; *Maynard v. Wright*, 26 Beav. 285. This construction was refused in *Pearson v. Rutter*, 3 De G. M. & G. 398; *Day v. Day*, Kay, 703; *Coates v. Hart*, 32 Beav. 349; *Grey v. Pearson*, 6 H. L. C. 61; *Secombe v. Evans*, 28 Beav. 440; *Malcolm v. Malcolm*, 21 Beav. 225; *Hawksworth v. Hawksworth*, 27 Beav. 1. “And” may be construed “or” when one member of the compound sentence is included in the other, and would be superfluous unless disjoined: *Day v. Day*, Kay, 703, 708, by Wood, V.-C. This construction is generally made in favour of vesting, and not to defeat a vested gift: *Ibid*.

(*q*) *Smart v. Clark*, 3 Russ. Ch. C. 365. But see *Bartleman v. Murchison*, 2 Russ. & M. 136.

(*r*) *Martineau v. Rogers*, 8 De G. M. & G. 328.

(*s*) *Kennedy v. Sedgwick*, 3 Kay & J. 540; *Treharne v. Layton*, 23 W. R. 799; L. R. 10 Q. B. 459; *White v. Hill*, L. R. 4 Eq. 265; *Bryden v. Willett*, L. R. 7 Eq. 472; *Re Brown's Trusts*, L. R. 16 Eq. 239; *Boyle v. Yorstown*, 78 L. T. 457. Cf. *Re Cobbold*, [1903] 2 Ch. 299. See, however, *Re Ball*, 40 C. D. 11. The principle of construction whereby in the case of a gift over on death without “leaving” children, the word “leaving” is construed “having,” so as not to take away an interest previously vested, will not readily be applied where the subject-matter of the gift is an annuity which *ex vi termini*

"payable" may be construed "vested" (t). And the word "survivor" may be construed "other" (u). So the words "not survive" may be construed as equivalent to die in "the lifetime of" (x). So the word "receivable" may be construed "received" (y). So "without having issue" may be construed in all respects as the same as "without issue" (z). So "issue" may be restricted to "children" (a). So "next surviving son" may be construed "next younger" and not "next elder" surviving son (b). So the word "entitled" must be read "entitled

"payable"
construed
"vested:"
"survivor"
construed
"other:"
"receivable"
construed
"received:"
"without
having issue"
construed
"without
issue:"
"issue"
restricted to
"children:"
"next sur-
viving son"
read "next
younger sur-
viving son:"
"entitled"

involves the notion of personal enjoyment: *Re Hemingway*, 45 C. D. 453.

(t) *Haydon v. Rose*, L. R. 10 Eq. 224. So "vested" may be read "indefeasible": *Re Edmondson's Estate*, L. R. 5 Eq. 389; *Greenhalgh v. Bates*, L. R. 2 P. & D. 47. See *post*, p. 1003.

(u) *Wilmot v. Wilmot*, 8 Ves. 10; *Eyre v. Marsden*, 4 M. & Cr. 240; *Hurry v. Morgan*, L. R. 3 Eq. 152; *Re Arnold's Trusts*, L. R. 10 Eq. 252; *Waite v. Littlewood*, L. R. 8 Ch. 70; *Re Palmer's Trusts*, L. R. 19 Eq. 320; *Cross v. Maltby*, L. R. 20 Eq. 378; *Wake v. Varah*, 2 C. D. 348; *Lucena v. Lucena*, 7 C. D. 255. But in *Re Horner*, 19 C. D. 186, the Court refused to construe "survivor or survivors" as "other or others." For other cases to the same effect, see *post*, p. 1210 *et seq.*

(x) *Reed v. Braithwaite*, L. R. 11 Eq. 514.

(y) *Re Dodgson's Trusts*, 1 Drew. 440; *West v. Miller*, L. R. 6 Eq. 59.

(z) *Eastwood v. Lockwood*, L. R. 3 Eq. 487, 495. Where a gift to the children is a vested gift, it will not become divested by the use of the words in case the parent die "leaving no issue": and "leaving no issue" should be construed "having had no issue": *Treharne v. Layton*, L. R. 10 Q. B. 459. See judgment of Amphlett, B., *ibid.*, at p. 463, where it is recognized as an established principle: *Re Bradbury*, 73 L. J. Ch. 591. Following *Treharne v. Layton*, the Court of Appeal, in *Re Cobbold*, [1903] 2 Ch. 299, held that it is a now well settled principle that where there is a gift by Will to A. for life, and after his death to his children, in terms which give the children an absolute interest in A.'s lifetime, followed by a gift over "if A. dies without leaving children," the word "leaving" is so to be construed as not to destroy any prior vested interest—that is to say, "without leaving children" should be read as "without leaving children who have not attained vested interests"; and this principle of construction is not affected by the circumstance that the testator knew of the existence of a child of A., and that such knowledge appears on the face of the Will itself. See, however, *Re Ball*, 40 C. D. 11 (explained in *Barkworth v. Barkworth*, 75 L. J. Ch. 754), where it was held that the cases where "leaving" had been construed "having," in order to prevent a clear previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested; and overruling *White v. Hight*, 12 C. D. 751. In *Re Booth*, [1900] 1 Ch. 768, the words "but should she die without child or children" were read as meaning without a child or children living at her death.

(a) *Bryden v. Willett*, L. R. 7 Eq. 472; *Re Hopkins' Trusts*, 9 C. D. 131; *post*, p. 879.

(b) *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

read "entitled in possession:"

"representatives" read "next of kin" or "descendants:"

"ascertained" construed

"made certain:"

"at their death" construed "at their respective deaths."

Gift to daughters to be "settled upon them strictly."

in possession" if the context requires it (c). So the expression "in possession" may be read as meaning "entitled to a vested estate tail in remainder" (d). So the word "representatives" has been construed as "next of kin" or "descendants" (e). So the word "ascertained" should be construed "made certain" (f). And the words "at their death" should be construed "at the death of each respectively" (g).

In *Loch v. Bagley* (h), where a testator directed that his daughters' shares under his Will should be "settled upon themselves strictly," it was held by Lord Romilly, M. R., that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use without power of anticipation; and if she died first, then her share should go as she should by Will appoint, and in default of appointment to her next of kin, exclusively of her husband; and if she survived, then to her absolutely. But in *Magrath v. Morehead* (i), where a testator directed the shares of daughters "to be settled on themselves at their marriage," Bacon, V.-C., held that two daughters, having attained twenty-one, and being unmarried, were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute.

Mistake in a Will.

A mistake in a Will cannot be corrected, or an omission supplied, unless it clearly appears by fair inference from the whole Will (k). But a clerical error can be corrected by the Court of Construction where, if uncorrected, it makes the Will absurd, and the proper correction can be gathered from the context (l). And an erroneous statement in fact may be cor-

(c) *Re Clinton's Trusts*, L. R. 13 Eq. 295; *Re Noyce*, 31 C. D. 75; *Re Maunder*, [1902] 2 Ch. 875; [1903] 1 Ch. 451; *Re Bland's Settlement*, [1905] 1 Ch. 4.

(d) *Foley v. Burnell*, 1 Bro. C. C. 274; *Martelli v. Holloway*, L. R. 5 H. L. 532; *Re Lewis*, [1918] 2 Ch. 308. Cf. *Re Fothergill's Estate*, [1903] 1 Ch. 149; *Re Atkinson*, [1916] 1 Ch. 91.

(e) *Re Horner*, 37 C. D. 695; *post*, p. 896 *et seq.*

(f) *Sidebottom v. Sidebottom*, L. R. 2 P. & D. 365.

(g) *Wills v. Wills*, L. R. 20 Eq. 342; and cf. *Re Hutchinson's Trusts*, 21 C. D. 811.

(h) L. R. 4 Eq. 122.

(i) L. R. 12 Eq. 491. See also *Re Jordan's Trust*, [1903] 1 Ir. 120.

(k) *Philipps v. Chamberlaine*, 4 Ves. 57; *Dent v. Pepys*, Madd. & Geld. 351. As to the application of parol evidence to rectify mistakes in the description of legatees, see *post*, p. 909 *et seq.*

(l) *Re Northen's Estate*, 28 C. D. 153; *Re Mayell*, [1913] 2 Ch. 488. As to the power of the Court of Probate to correct errors, see *ante*, p. 253 *et seq.*

rected, and will not necessarily be binding on a legatee so as to cut down an express gift (*m*). Hence not only in cases of devises of real estate, but also of Wills of personal property, the Court cannot, in its interpretation of the intention of the testator, pay the least regard to any variance between the Will as it stands, and the instructions given for preparing it (*n*).

Again, an express bequest cannot be controlled by the reason assigned: The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear (*o*). Nor can any express disposition be varied by inference or argument from other parts of the Will (*p*): Much less shall the obvious construction of a Will be controlled by the inconvenient or unmeritorious nature of the bequest (*q*): On the contrary, the Court is bound to correct every inaccuracy and impropriety of terms in advancement of the *manifest* intention of the testator, however undeserving it may be of favour in a Court of Justice (*r*). Where, indeed, the literal force of expressions differs in a Will, it is a true rule to seek for the intention of the testator rather in a consistent and rational purpose, than in a purpose inconsistent and irrational (*s*).

Bequest not to be controlled by the reason given for it: nor by inference from other parts of the Will, nor by its unmeritorious nature.

6. Where words are capable of a twofold construction the rule is, even in the case of a deed, and much more in the case of a Will, to adopt such as tend to make it good (*t*).

6. Where words are capable of a twofold construction.

7. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but it is to work as far as it can (*u*).

7. Where intention cannot take effect in part.

8. It is a settled rule, that, in the construction of a Will of personalty made by a testator domiciled in a foreign country,

8. Construction of Wills made by

(*m*) *Re Taylor's Estate*, 22 C. D. 495; *Re Kelsey*, [1905] 2 Ch. 465. See, however, *Re Aird's Estate*, 12 C. D. 291; *Re Wood*, 32 C. D. 517; *ante*, p. 847, n. (*h*).

(*n*) *Murray v. Jones*, 2 V. & B. 318. See further, on this point, *Webber v. Stanley*, 16 C. B. N. S. 698; *Re Cawley*, [1920] 1 Ir. R. 78.

(*o*) *Cole v. Wade*, 16 Ves. 46.

(*p*) *Collett v. Lawrence*, 1 Ves. 269; *Jones v. Colbeck*, 8 Ves. 42.

(*q*) *Thellusson v. Woodford*, 4 Ves. 329; *Smith v. Streatfield*, 1 Meriv. 358; *Defflis v. Goldschmidt*, 1 Meriv. 419.

(*r*) *Thellusson v. Woodford*, 4 Ves. 311, by Lawrence, J.

(*s*) *Jenkins v. Herries*, 4 Madd. 67.

(*t*) By Lord Talbot, in *Atkinson v. Hutchinson*, 3 P. Wms. 260. By Lawrence, J., in *Thellusson v. Woodford*, 4 Ves. 312; *Martelli v. Holloway*, L. R. 5 H. L. 532.

(*u*) *Thellusson v. Woodford*, 4 Ves. 326, by Buller, J.

testators domiciled in a foreign country.

the *lex domicilii* must prevail, unless there is sufficient on the face of the Will to show a different intention (*v*).

9. Will speaks from testator's death.

9. A Will of personalty, whether made before or after the Wills Act, speaks from the time of the testator's death (*x*).

SECTION II.

Modes of Description of a Legatee.

The object of this section is to consider what persons are entitled to legacies under particular modes of description.

In general, no rule is better settled, than that legatees must answer the description and character given of them in the Will (*y*); but it will appear, from the cases adduced in the course of the present section, that there are many important exceptions to it.

(A.) *Who are entitled under the description of* 1. "Children:" 2. "Grandchildren:" 3. "Wife," "Husband:" 4. "Nephews and Nieces:" 5. "Cousins."

1. "Children" in a class:

when confined to those existing at the date of the Will:

1. "Children." Generally speaking, every person who *at the time of the testator's death* falls within the prescribed class of "children" will be entitled: But where it appears from express declaration, or clear inference upon the Will, that the testator intended to confine his bequests to those only who answered the description *at the date of the instrument*, such intention must be carried into effect (*z*). A Court of Equity, however, is always anxious to include all children in existence at the time of the death of the testator (*a*): and particularly,

(*v*) Story's Conflict of Laws, ss. 479 *a*, 479 *m*, 490, 491; *Enohin v. Wylie*, 10 H. L. C. 1; *Martin v. Lee*, 14 Moo. P. C. 142; *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Whicker v. Hume*, 7 H. L. C. 124, 156, 156, 166; *Shaw v. Gould*, L. R. 3 H. L. 55; *Studd v. Cook*, 8 App. Cas. 577; *Re Price*, [1900] 1 Ch. 442. As to what is sufficient to show an intention that a Will should operate according to law foreign to that of the testator's domicile, see *Bradford v. Young*, 26 C. D. 656; 29 C. D. 617. See further on the subject of domicile, *ante*, p. 267, n. (*u*), and *post*, Pt. III. Bk. iv. Ch. i. § v.

(*x*) *Ante*, p. 145; *post*, Pt. III. Bk. III. Ch. iv. § VIII.

(*y*) See *National Soc. v. Scottish National Soc.*, [1915] A. C. 207.

(*z*) *Sherer v. Bishop*, 4 Bro. C. C. 55. See also *Viner v. Francis*, 2 Cox, 191, 192.

(*a*) *Ringrose v. Bramham*, 2 Cox, 384.

when he stands in the relation of parent to the legatees, the Court, presuming that he intended to do his duty in providing for all his children at his death, will lay hold of any general expression to give effect to his presumed intention, and will not permit such general expression to be narrowed by the context (*b*).

The leading principle is, that where a bequest is immediate to "children" in a class, children in existence at the death of the testator, and these alone, are entitled (*c*) (amongst which children *en ventre sa mère* are to be considered) (*d*): And it will make no difference that the bequest is to children "begotten or to be begotten" (*e*).

when confined to those existing at the death of the testator.

(*b*) *Matchwick v. Cock*, 3 Ves. 609; *Freemantle v. Taylor*, 15 Ves. 363. But although, where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the Court leans strongly in favour of early vesting, yet, where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period: *Re Deighton's Settled Estates*, 2 C. D. 783.

(*c*) *Roberts v. Higman*, 1 Bro. C. C. 532, *in notis*; *Viner v. Francis*, 2 Bro. C. C. 658; *S. C.*, 2 Cox, 190; *Crone v. Odell*, 1 Ball & Beat. 459; *Davidson v. Dallas*, 14 Ves. 576; *Scott v. Harwood*, 5 Madd. 332; *Ringrose v. Bramham*, 2 Cox, 384; *De Witte v. De Witte*, 11 Sim. 41; *Mann v. Thompson*, Kay, 638; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Rogers v. Mutch*, 10 C. D. 25. Whenever there are words of immediate bequest used in a Will indicative of a class, the words must be taken to denote the class as it is constituted, either at the date of the Will or at the death of the testator: *Parker v. Tootal*, 11 H. L. C. 143, 164, by Lord Westbury; and the same rule would seem to apply where the gift is of income: *Re Powell*, [1898] 1 Ch. 227. A devise of real estate will be treated as immediate, notwithstanding it is subject to a term to secure annuities, and a child born after the death of the testator, but before the death of the annuitants, will be excluded from the class: *Singleton v. Gilbert*, 1 Bro. C. C. 542 (*n*); 1 Cox, 68.

(*d*) *Bostoft v. Wadsworth*, 12 W. R. 523; *Clarke v. Blake*, 2 Bro. C. C. 320; *Doe v. Clarke*, 2 H. Bl. 399; *Rawlins v. Rawlins*, 2 Cox, 425; *Trower v. Butts*, 1 Sim. & Stu. 181; *Pearce v. Carrington*, L. R. 8 Ch. 969; *Villar v. Gilbey*, [1907] A. C. 139; *Re Salaman*, [1908] 1 Ch. 4. But there is no rule of law that the word "born" includes a child *en ventre sa mère* under all circumstances. The rule is limited to cases where that construction is necessary for the benefit of the child: *Villar v. Gilbey*, *supra*. But where a testatrix bequeathed 1,000*l.* "to each of the three children of my niece," and at the date of the Will there was a fourth child *en ventre sa mère* which was born before the death of the testatrix, it was held by Hall, V.-C., that the three children born at the date of the Will only were entitled to legacies: *Re Emery's Estate*, 3 C. D. 300.

(*e*) *Sprackling v. Ranier*, 1 Dick. 344; *Storrs v. Benbow*, 2 M. & K. 46; 3 De G. M. & G. 390; *Early v. Middleton*, 14 Beav. 453; *Butler v. Lowe*, 10 Sim. 317; *Mann v. Thompson*, Kay, 638; *Dias v. De Livera*, 5 App. Cas. 123, 134. A different rule prevails as to real estate: see *Gooch v. Gooch*, 14 Beav. 565; 3 De G. M. & G. 366; *Locke*

Children born after testator's death may be entitled under bequest to "children" in a class.

It must, however, be observed, that children born after the testator's death may be entitled under a bequest to "children" in a class, in cases where the division of the fund among the legatees is deferred until a particular period which takes place after his decease (*f*). Thus where legacies are given to "the children" of A., when a child or children attain a particular age (*g*), or to be divided amongst them at the death of B. (*h*), any child who falls under the description *at the time when the fund is to be divided* is entitled to a share, although not born till after the testator's death (*i*); and although born of a sub-

v. Dunlop, 39 C. D. 387. As to whether a bequest to children "to be born," or "hereafter to be born," or "that *may* be born," includes children in existence at the date of the Will, see *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 Beav. 453; *Townshend v. Early*, 28 Beav. 429; *S. C.*, 3 De G. F. & J. 1; *Almack v. Horn*, 1 Hemm. & M. 630; *Gibbons v. Gibbons*, 6 App. Cas. 471.

(*f*) See *Oppenheim v. Henry*, 10 Hare, 441.

(*g*) *Gilmore v. Severn*, 1 Bro. C. C. 582 (recognized *per M. R.* in *Ringrose v. Bramham*, 2 Cox, 385); *Hoste v. Pratt*, 3 Ves. 730; *Hughes v. Hughes*, 14 Ves. 256; *Curtis v. Curtis*, 6 Madd. 14; *Balm v. Balm*, 3 Sim. 492; *Titcomb v. Butler*, 3 Sim. 417; *Blease v. Burgh*, 2 Beav. 221; *Gardner v. James*, 6 Beav. 170; *Clarke v. Clarke*, 8 Sim. 59. The age, however, must be such as not to offend against the rule against perpetuities: *Williams v. Teale*, 6 Hare, 239; *Bentinck v. Duke of Portland*, 7 C. D. 693. But it is sufficient if one member of the class reach the age of distribution in the lifetime of the testator: *Picken v. Matthews*, 10 C. D. 264.

(*h*) *Ellison v. Airey*, 1 Ves. Sen. 111; *Att.-Gen. v. Crispin*, 1 Bro. C. C. 386; *Congreve v. Congreve*, 1 Bro. C. C. 530; *Devisme v. Mello*, 1 Bro. C. C. 537; *Crone v. Odell*, 1 Ball & Beat. 459, 483; *Morse v. Morse*, 2 Sim. 485; *Browne v. Hammond*, Johns. 212, note (*a*); *Re Canney's Trusts*, [1910] W. N. 45. Where a testator left a fund to be divided amongst the children of his son on the determination of his life estate as and when they should respectively attain the age of twenty-one, with a proviso for the determination of the son's life estate in case of his being adjudicated bankrupt, and that the fund and income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children in the same manner as if he were naturally dead, and his adjudication happened after the death of the testator, it was held that the period of distribution remained unaltered, so that children born after the adjudication who attained twenty-one would be entitled to share: *Re Bedson's Trusts*, 28 C. D. 523. As to the effect of such a forfeiture on a limitation of real estate, see *Blackman v. Fysh*, [1892] 3 Ch. 209.

(*i*) A child, however, falling under the description at the time when the fund is to be divided, born after the time of the testator's death, will not be entitled to a share, if so to hold would be a violation of the rule against perpetuities, and thus result in an intestacy; but the gift to the class will, notwithstanding the period fixed for division, be treated as an immediate gift to take effect on the death of the testator, although the fund will be divisible only between such of the children living at the death of the testator as attain the requisite age: *Elliot v. Elliott*, 12 Sim. 276; *Re Coppard*, 35 C. D. 350; *Re Mervin*,

sequent marriage (*k*); and whether the gift be vested or contingent (*l*). But no child born after the period of distribution has nay claim (*m*): even where the legacy is given to children "born or to be born" (*n*). And the children are excluded who are born after the fund becomes distributable in respect of any one object or member of the class, or after the vesting in possession of any of the shares (*o*). Cases, however, may occur, where the whole context of the Will displays a manifest intention of the testator to provide for *all* the children an individual may have, although their shares are appointed to be paid at a particular period; and then, although a difficulty may exist in making an appropriation to answer legacies given to an uncertain

[1891] 3 Ch. 197, 204; *Willerton v. Stocks* (1892), W. N. 29; *Re Stevens* (1896), W. N. 24.

(*k*) *Barrington v. Tristram*, 6 Ves. 345; *Critchett v. Taynton*, 1 Russ. & M. 541. Nor will this be less so because a life estate is interposed before the gift to the children: *Re Emmet's Estate*, 13 C. D. 484. But the interposition of such an estate may show that the death of the tenant for life is the period of division: *Berkeley v. Swinburne*, 16 Sim. 275; *Re Faux*, 84 L. J. Ch. 873. And cf. *Re Stephens*, [1904] 1 Ch. 322.

(*l*) *Mann v. Thompson*, Kay, 638.

(*m*) *Andrews v. Partington*, 3 Bro. C. C. 402; *Prescott v. Long*, 2 Ves. 690; *Hoste v. Pratt*, 3 Ves. 730; *Godfrey v. Davis*, 6 Ves. 43; *Berkeley v. Swinburne*, 16 Sim. 275; *Gimblett v. Purton*, L. R. 12 Eq. 427; *Re Gardiner's Estate*, L. R. 20 Eq. 647; *Re Deloitte*, [1919] 1 Ch. 209; *Re Paul*, [1920] 1 Ch. 99.

(*n*) *Whitbread v. St. John*, 10 Ves. 152; *Gilbert v. Boorman*, 11 Ves. 238. See further as to the admission or exclusion of after-born children: *Graves v. Boyle*, 1 Atk. 509; *Haughton v. Harrison*, 2 Atk. 329; *Middleton v. Messenger*, 5 Ves. 136; *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Ayton v. Ayton*, 1 Cox, 327; *Paul v. Compton*, 8 Ves. 375; *Walker v. Shore*, 15 Ves. 122; *Tebbs v. Carpenter*, 1 Madd. 290; *Clarke v. Clarke*, 8 Sim. 59; *Scott v. Lord Scarborough*, 1 Beav. 154; *Brandon v. Aston*, 2 Y. & Coll. 30.

(*o*) See the judgment of Wigram, V.-C., in *Mainwaring v. Beevor*, 8 Hare, 48, 49, and of Wood, V.-C., in *Mann v. Thompson*, Kay, 638, 641, 642, and in *Re Smith*, 2 J. & H. 601, as to the foundation of the rule and as to the cases when it is and is not applicable. See also *Kevern v. Williams*, 5 Sim. 171; *Elliott v. Elliott*, 12 Sim. 276; *Hagger v. Payne*, 23 Beav. 474; *Bateman v. Grey*, L. R. 6 Eq. 215; *Iredell v. Iredell*, 25 Beav. 485; followed in *Re Courtenay*, 74 L. J. Ch. 654; *Gilman v. Daunt*, 3 K. & J. 48; *Armitage v. Williams*, 27 Beav. 346; *Re Deloitte*, [1919] 1 Ch. 209. The rule of convenience, by which in a bequest of an aggregate fund to children as a class payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into being after the period are excluded, was apparently held by Chitty, J., to be not applicable to similar bequests of income: *Re Wenmoth*, 37 C. D. 266. But cf. *Re Powell*, [1898] 1 Ch. 227, where there was no prescribed age, and the class was held to be fixed at the death of the testator. See also the comments of Buckley, J., on *Re Wenmoth*, in *Re Stephens*, [1904] 1 Ch. 322, 329.

number of persons, viz., all the children an individual may ever have, yet the intention not to exclude any of them must be complied with (*p*).

It should be further observed, that in the case of an immediate gift to children, if there is no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift (*q*).

It may be material in this place to observe, that upon an ordinary limitation *by way of remainder* to children, &c., in a class, all who are *in esse* at the time of the death of the testator take vested, and, consequently, transmissible interests immediately upon the testator's death; and all who come *in esse* before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come *in esse*, and they and their representatives will take as if they had been *in esse* at the testator's death (*r*).

Bequest to
A. and his
children.

Rule in
Wild's Case.

It is a doctrine, with respect to Wills of real estate, according to what is usually called "the rule in *Wild's Case*" (*s*), that where lands are devised to a man *and his children*, he having none at the time of the devise, the word "children" must be taken as a word of limitation, and he shall take an estate tail; but if he has any children living at the time of the devise, the word "children" must be taken as a word of purchase (which it naturally is) and they will take a joint estate with him.

Rule inappli-
cable to Wills
of personal
estate.

But it would seem that this rule is not applicable to Wills of personal estate (*t*), as to which it is established, that an absolute interest will pass by terms which, if employed with respect to real property, would create an estate tail (*u*). The rule appears

(*p*) *Defflis v. Goldschmidt*, 1 Meriv. 417; *S. C.*, 19 Ves. 566; *Hutchinson v. Jones*, 2 Madd. 124; *Evans v. Harris*, 5 Beav. 45; *Eddowes v. Eddowes*, 30 Beav. 603.

(*q*) *Harris v. Lloyd*, 1 Turn. & Russ. 310; Jarman on Wills, 6th edit. 1687. So in the case of a gift preceded by an anterior interest, if there be no object at the time of the vesting in possession, all the children subsequently born will, it would seem, be let in, unless the terms of the gift restrict it to a narrower class of objects: *Ibid.* 1692.

(*r*) Jarman on Wills, 6th edit. 1667.

(*s*) 6 Co. 16 *b*, 17 *b*; and see *Clifford v. Koe*, 5 App. Cas. 447.

(*t*) See *Stokes v. Heron*, 12 Ol. & Fin. 161. In *Audsley v. Horn*, 26 Beav. 195; 1 De G. F. & J. 226, Lord Campbell, C., deliberately held that the rule did not apply to personal estate. The rule is explained in *Webb v. Byng*, 2 Kay & J. 669, and *Byng v. Byng*, 10 H. L. C. 171. It was held in *Grieve v. Grieve*, L. R. 4 Eq. 180, that the rule was not inflexible, where a contrary intention appeared in the Will from there being a gift of furniture to go with the house.

(*u*) See *post*, p. 872.

to have been applied, so as to give the parent an absolute interest, where there have been no children at the date of the Will or the death of the testator (*x*); though it seems sometimes to have been laid down, that, in such a case, the parent shall take only a life interest, with remainder to his children, if any should be subsequently born (*y*). And where there have been children living at the date of the Will, they have been held to take the whole interest jointly with their parents, and with any other children born before the testator's death (*z*); though in this case also, slight circumstances in the context appear to have been thought sufficient to justify the Court in holding that the parent shall take for life, with remainder to his children (*a*); which would include all children, both those born before, and those born after the testator's death (*b*).

It is established, ordinarily speaking, that where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an eldest before the time of vesting, or, according to the language used in some of the authorities, before the time of distribution, such younger son is to be excluded (*c*). But the principle of these cases does not apply to a

“Younger children:”

when a younger child considered eldest and excluded:

(*x*) *Pyne v. Franklin*, 5 Sim. 458; *Read v. Willis*, 1 Coll. 86; *Scott v. Scott*, 15 Sim. 47; *Snowball v. Proctor*, 2 Y. & Coll. Ch. C. 478. But a bequest of personal estate to A. B. “and to his first and other sons after him in the usual mode of succession” is only a gift for life: *Sparling v. Parker*, 29 Beav. 450. But see *Tyrone v. Waterford*, 1 De G. F. & J. 613, where it was held on the construction of the whole Will that a gift to “B. and to his children in succession” conferred an absolute interest in the general personalty.

(*y*) *Paine v. Wagner*, 12 Sim. 188, per Shadwell, V.-C.; 2 Dr. & W. 107, per Sugden, C. of Ireland. See also *Bain v. Lescher*, 11 Sim. 397; *Robinson v. Hunt*, 4 Beav. 450; *Audsley v. Horn*, 26 Beav. 195; *S. C.*, 1 De G. F. & J. 226.

(*z*) *De Witte v. De Witte*, 11 Sim. 41; *Pain v. Wagner*, 12 Sim. 184; *Beales v. Crisford*, 13 Sim. 592; *Crockett v. Crockett*, 2 Phil. Ch. C. 555, per Lord Cottenham; *Newill v. Newill*, L. R. 7 Ch. 253, reversing the decision of Malins, V.-C., L. R. 12 Eq. 432; *Fisher v. Webster*, L. R. 14 Eq. 283. If the gift be to A. and B. and their children, A. and B. will take but one share: *Gordon v. Whieldon*, 11 Beav. 170; *Atcheson v. Atcheson*, *ibid.* 485.

(*a*) *Crawford v. Trotter*, 4 Madd. 361; *Jeffery v. Honeywood*, *ibid.* 399; *Morse v. Morse*, 2 Sim. 485; *Vaughan v. Lord Headfort*, 10 Sim. 639; *French v. French*, 11 Sim. 257; *Combe v. Hughes*, L. R. 14 Eq. 415; *Crockett v. Crockett*, 2 Phil. Ch. C. 555, 556, per Lord Cottenham; *e.g.*, if there be any superadded words which import a desire that the property should be settled: *Mason v. Clarke*, 17 Beav. 126, 131; *Cormack v. Copous*, 17 Beav. 397; *Dawson v. Bourne*, 16 Beav. 29; *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Re Owen's Trusts*, L. R. 12 Eq. 316.

(*b*) *Leake v. Robinson*, 2 Meriv. 382; *ante*, p. 854.

(*c*) *Chadwick v. Doleman*, 2 Vern. 528; *Teynham v. Webb*, 2 Ves.

younger son succeeding to the reversion of the settled estates, not under the settlement under which the portions were created, but by descent (*d*). In the case of *Matthews v. Paul* (*e*), where the eldest son was not construed as eldest son entitled to a particular estate, Sir T. Plumer, M. R., was of opinion, that even if the share, by the provisions of the Will, vested in the younger child at the age of twenty-one, and he attained that age, yet, nevertheless, the vesting would be *sub modo* only, subject to be divested, and under the condition of not becoming an eldest son (*f*). But this case was doubted by Kay, J.,

Sen. 193, 210; *Hall v. Hewer*, Ambl. 203; *Loder v. Loder*, 2 Ves. Sen. 526; *Broadmead v. Wood*, 1 Bro. C. C. 77; *Lincoln v. Pelham*, 10 Ves. 166; *Bowles v. Bowles*, 10 Ves. 177; *Matthews v. Paul*, 3 Swanst. 334; *Savage v. Carroll*, 1 Ball & Beat. 265; *Davies v. Huguenin*, 1 Hemm. & M. 730; *Wood v. Wood*, L. R. 4 Eq. 48; *Re Bayley's Settlement*, L. R. 6 Ch. 590; *Re Stawell*, [1909] 1 Ch. 534; [1909] 2 Ch. 239. The time for ascertaining the eldest son for the purpose of his exclusion would seem to depend on the relation of the testator to the objects of his bounty and the reason of the exclusion. Thus, if the intention of the testator seems to be to provide portions for all children except such as should, as eldest son, take a particular estate, the time for ascertaining the eldest son will be the time of distribution. See *Collingwood v. Stanhope*, per Hatherley, L. C., L. R. 4 H. L. 43, 53; in other cases the time of vesting. In the former case "eldest son" will include the series of persons who from time to time take that estate, whereas in the latter case "eldest son" will mean the one individual who at the time of vesting occupies that position. Thus Kay, J., in *Domville v. Winnington*, 26 C. D. 382, says that if "eldest son" should be read "son entitled to the settled estate," the time for ascertaining the excluded son would be the time of distributing the younger children's portions, or if "eldest son" is to be read according to its natural meaning, the time of vesting is the time for exclusion. But even in cases in which the person excluded is the person answering the description of eldest son at the time appointed for distribution, an eldest son, who has joined with his father in barring the entail and resettling the estate at a time anterior to the distribution of the fund for younger children, will be treated as the eldest son entitled under the Will and thus excluded, although his title to the estate at the period of the distribution depended, not on the Will, but on the settlement: *Collingwood v. Stanhope*, L. R. 4 H. L. 43; *Shuttleworth v. Murray*, [1901] 1 Ch. 819; [1902] A. C. 263, *sub nom. Law Union and Crown Insurance Co. v. Hill*; and observation of Lord Davey, at p. 266; and see Farwell on Powers, 3rd edit. pp. 561 *et seq.*

(*d*) *Sing v. Leslie*, 2 Hemm. & M. 68. See also *Re Fitzgerald's Settled Estates*, [1891] 3 Ch. 394, where a younger son succeeded to the bulk of the estates under a re-settlement by the father and eldest son (who subsequently died in the lifetime of the father without issue); and it was held that the younger son nevertheless took a share in the portions fund under the original settlement.

(*e*) Swanst 340. See *Livesey v. Livesey*, 13 Sim. 33, 43; 2 H. of L. 419.

(*f*) With respect to the divesting of vested shares, see *Chadwick v. Doleman*, 2 Vern. 528; and compare *contra. Driver v. Frank*, 3 M. & S. 25 (S. C., in error, 8 Taunt. 468; 6 Price, 41); *Graham v.*

in *Domville v. Winnington* (g), who said, "If it be taken as a decision that the gift of a vested interest in a legacy to children other than an eldest son or only son, where the exclusion is not with reference to an estate, deprives every son who may become the eldest before the time of distribution of any share, and that a vested interest of that kind contains a tacit condition divesting it on the younger becoming an elder before the period of distribution, I confess that I should have great difficulty in agreeing with such a construction. The doctrine of *Chadwick v. Doleman* (h) applies only to cases where eldest son means the son entitled to a particular estate, and the only ground of that doctrine is to prevent his having both the estate and also a portion, and in the earlier part of his judgment Sir T. Plumer treats the case as not being within that class of decisions." In the case of *Windham v. Graham* (i) it was held by Lord Gifford, M. R., that a son who, when he attained twenty-one, was a younger child, but by the subsequent death of his elder brother, in the lifetime of his parents, had become an eldest son before the time fixed for the payment of the younger children's portions, was entitled to his share of portions, which were directed to vest in younger sons at twenty-one,

Londonderry, cited 2 Ves. Sen. 199. The doctrine of *Chadwick v. Doleman*, *ubi sup.*, as to the exclusion of a younger child who has become an eldest son at the time of distribution, and the divesting thereupon of his share as a younger child, does not apply except in cases where the settlor stands *in loco parentis*. See *Sandeman v. Mackenzie*, 1 J. & H. 613; and *post*, p. 860, note (p). Where no reason is shown by the settlement for excluding the eldest son, such as his accession to another estate, the share which has vested in the younger son will not be divested by his becoming the eldest: *Re Theed's Settlement*, 3 K. & J. 375. It has been held by Sir J. Romilly, M. R., that the character of "eldest son" is in ordinary cases to be ascertained at the period of vesting and not of payment: *Adams v. Beck*, 25 Beav. 648; *Adams v. Adams*, 25 Beav. 652; and his Honor held the same as to the character of "younger child": *Adams v. Roberts*, 25 Beav. 658. As to the construction in settlements of "eldest son" as that son who under the provisions of the settlement comes into possession of the estate, see *Re Bayley's Settlement*, L. R. 6 Ch. 590.

(g) 26 C.D. 332.

(h) 2 Vern. 528.

(i) 1 Russ. Chanc. Cas. 331. But this case recognized the rule that in cases where "eldest son" is to be treated as "eldest son entitled to a particular estate," the class of younger children must generally be ascertained at the period of distribution: but held that on the peculiar words of that case the character of younger child was to be ascertained when the portions vested and became payable. See *Re Bayley's Settlement* (*ubi supra*); *Re Wisc*, [1913] 1 Ch. 41. See also *Re Prytherch*, 42 Ch. D. 590, where the rule was recognized, but not applied, owing to the strong vesting words used in the Will.

though not payable till after the death of his parents, upon the ground that there was enough in the instrument by which the portions were provided to show that the character of the younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable (*k*).

when an
eldest con-
sidered a
younger child
and included.

In some cases the Court has thought itself at liberty to construe terms of seniority and age, when applied by a testator to children, as referring to the child who takes, or does not take, the family estate; though this can only be allowed when there is enough on the face of the Will to justify such a mode of dealing with the words (*l*). For example, an *eldest* daughter destitute of a provision has been considered a younger child, to answer the general intention, though not falling literally, within the description (*m*). So where the only issue of the marriage was a daughter, it was held that she was entitled to a portion provided for younger children, as otherwise she would have been left destitute, the real estate descending in another channel (*n*). So an eldest son will be enabled to claim a portion as a younger child, when the family estate is given from him, or he is otherwise unprovided for (*o*). But this "prodigious latitude of construction" (as it has been called) is only allowable when the testator stands in the relation of parent, or *in loco parentis*, to the children (*p*). "It is founded," said Lord Langdale, in *Peacocke v. Pares* (*q*), "on the presumption that

(*k*) See further on the question who is entitled to take as "first son" and "second son," *Lomax v. Holmden*, 1 Ves. Sen. 290, 294; *Hawkins v. Hawkins*, 9 Bingh. 765; *King v. Bennett*, 4 Mees. & W. 36; *Adams v. Bush*, 6 Bingh. N. C. 164; *Langston v. Langston*, 8 Bligh, N. S. 167.

(*l*) *Livesey v. Livesey*, 2 H. L. C. 419, 435, by Lord Cottenham. See also *Wilbraham v. Scarisbrick*, 1 H. L. C. 167.

(*m*) *Beale v. Beale*, 1 P. Wms. 244; *Hall v. Luckup*, 4 Sim. 5.

(*n*) *Butler v. Duncomb*, 1 P. Wms. 449.

(*o*) *Emery v. England*, 3 Ves. 232; *Duke v. Doidge*, 2 Ves. Sen. 203, in a note to *Teynham v. Webb*. See also *Collingwood v. Stanhope*, L. R. 4 H. L. 43. So it has been held, that the representatives of an eldest son, who attained twenty-one and died before the period of distribution, never having become entitled in possession to the settled estate, took a share in the portions given to the younger sons: *Ellison v. Thomas*, 1 De G. J. & S. 18, reversing the decision in 2 Dr. & Sm. 14. See also *Davies v. Huquenin*, 1 Hemm. & M. 730, accord.

(*p*) *Hall v. Hewer*, Ambl. 203; *Lyddon v. Ellison*, 19 Beav. 565. However, it is said in Sugden on Powers, 8th edit. pp. 680, 681, that this distinction does not appear to be attended to at the present day. But it was acted on by Wood, V.-C., in *Sandeman v. Mackenzie*, 1 Johns. & H. 613, where the eldest son was excluded by name.

(*q*) 2 Keen, 599.

it was intended to provide for all the children of the marriage; and this presumption ought to be acted upon in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made, and within their intention to provide for: But none of the cases go the length of deciding, that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction upon that presumption" (r).

Another instance, where a child has been regarded as being within a description, which it does not in strictness answer, may be found in the case of a father bequeathing a portion to a child *en ventre sa mère*: for if a father gives a legacy to provide for such a child by the term of a "posthumous child," and he happen to survive its birth, it will still be considered a posthumous child within the meaning of the Will (s).

The word "children" does not, in its proper signification, extend further than the immediate descendants of the persons named: and consequently grandchildren, or issue generally, are not ordinarily included in that term (t).

Their inclusion, however, within the description of "children," has been permitted from necessity when the Will would be inoperative, unless the sense of the word children were extended beyond its natural import: as where there is no child in existence at the date of the Will (u). But there is no fixed rule to this effect (x).

(r) In this case, Lord Langdale proceeded to hold that a second son becoming an eldest son, but prevented from taking under the settlement by a recovery suffered in the lifetime of the elder brother, was excluded from a share in the portions. But this decision is directly contrary to that of *Spencer v. Spencer*, 8 Sim. 87: and its authority was denied by Wood, V.-C., in *Macoubrey v. Jones*, 2 Kay & J. 684, where his Honor held, that such a case fell within the established rule, that where that intention is clear, that no child shall be left without some provision, the Court is at liberty to admit to a share in the provisions made for younger children a son, who, though he may have become the eldest, does not become entitled to the settled estate.

(s) *Jaggard v. Jaggard*, Prec. Chanc. 177.

(t) *Radcliffe v. Buckley*, 10 Ves. 195; *Loring v. Thomas*, 1 Dr. & Sm. 497. *Contra*, "issue" may be restricted to "children": *Bryden v. Willett*, L. R. 7 Eq. 472; *Re Hopkins' Trusts*, 9 C. D. 131, 137; *Re Timson*, [1916] 2 Ch. 362.

(u) *Crooke v. Brookeing*, 2 Vern. 198; *Fenn v. Death*, 23 Beav. 73; *Berry v. Berry*, 3 Giff. 134; *Re Smith*, 35 C. D. 558.

(x) *Re Atkinson*, [1918] 2 Ch. 138.

In *Orford v. Churchill* (y), Sir William Grant said, he "never knew an instance where there were children, to answer the *proper* description, that grandchildren were permitted to share along with them."

There are, however, some cases, which must be regarded as qualifying this doctrine: viz., those in which it has been held that the testator, by using the words "children" and "issue" indiscriminately, has shown his intention of using the former term in the sense of "issue," so as to entitle grandchildren to take under it (z).

"Unmarried daughter."

When a legacy is given by Will to a daughter, who at the date of the Will has never been married, and the gift is made to be conditional upon the legatee being "unmarried" at a given time, the word "unmarried" may properly be construed "a spinster," and not "a widow" (a). When a fund is given

(y) 3 Ves. & Bea. 53.

(z) *Wyth v. Blackman*, 1 Ves. Sen. 196; *Gale v. Bennett*, Ambl. 681; *Royle v. Hamilton*, 4 Ves. 437; *Re Crawhall's Trust*, 8 De G. M. & G. 480. See *Orford v. Churchill*, 3 Ves. & Bea. 59. Where a testator devised lands to all the children or legal issue of A. in equal shares after the decease of A., it was held that the children of A. living at the death of the testator and those who were born afterwards, took vested interests in fee to the exclusion of the grandchildren: *Holland v. Wood*, L. R. 11 Eq. 91.

(a) *Re Sanders' Trusts*, 3 K. & J. 156; *Heywood v. Heywood*, 29 Beav. 9; *Radford v. Willis*, L. R. 7 Ch. 7. The word "unmarried" is of flexible meaning, but in the absence of context showing a contrary intention the word "unmarried" must be construed according to its ordinary or primary meaning as "never having been married": *Dalrymple v. Hall*, 16 C. D. 715; *Re Sergeant*, 26 C. D. 575; *Re Chant*, [1900] 2 Ch. 345; *Re Jones*, [1915] 1 Ch. 246. In *Re Lesingham's Trusts*, 24 C. D. 703, however, North, J., construed "sole and unmarried" as meaning "not having a husband," whether as being a spinster, widow, or divorced. In marriage settlements it has frequently been construed to mean "widow": *Re Norman's Trust*, 3 De G. M. & G. 965; *Re Saunders' Trusts*, 3 K. & J. 152; *Pratt v. Mathew*, 22 Beav. 328; *Clarke v. Colls*, 9 H. L. C. 601. As to the words "without having been married," being sometimes controlled by the context, see *Wilson v. Atkinson*, 4 De G. J. & Sm. 455; *Re Ball's Trust*, 11 C. D. 270; *Upton v. Brown*, 12 C. D. 872. The last two cases were disapproved by Jessel, M. R., in *Emmins v. Bradford*, 13 C. D. 493, but the latter case, though followed in *Re Deane's Trusts*, [1900] 1 I. R. 332, was not followed by Chitty, J., in *Stoddart v. Saville*, [1894] 1 Ch. 480, or by Kekewich, J., in *Re Mare*, [1902] 2 Ch. 112, both judges considering themselves bound by *Wilson v. Atkinson*, 4 De G. J. & Sm. 455. But the last-mentioned case was held by Swinfen Eady, J., in *Re Smith's Settlement*, [1903] 1 Ch. 373, to lay down no general rule, and he accordingly followed *Emmins v. Bradford*. Finally, in *Re Brydson's Settlement*, [1903] 2 Ch. 84, the Court of Appeal adopted the view of Jessel, M. R., in *Emmins v. Bradford*, and of Swinfen Eady, J., in *Re Smith's Settlement*.

to "unmarried daughters" in a class, the class is to be ascertained at the death of the testator (b).

Natural children, having acquired the reputation of being the children of a particular person, prior to the date of the Will, are capable of taking under the description of "children" (c). And they may take in classes of children "legitimate or illegitimate" (d). But the Will itself must show the testator's intention to include them under this description, either by express designation, or by necessary implication (e). For otherwise the term child, son, or issue must be understood to mean *legitimate* child, son, or issue (f). The only two exceptions to the rule that "children" *primâ facie* means legitimate children are those stated by Lord Cairns in *Hill v. Crook* (g) and *Dorin v. Dorin* (h), and the fact that the testator was informed and believed that the children were legitimate does not constitute a further exception to the rule (i).

"Children:"
when *natural*
children are
within this
description.

A natural child cannot take as the issue of a particular father until it has acquired the reputation of being the child of that person, which cannot be before its birth (j).

"Natural
child:"

It has been said in *Pratt v. Mathew* (k), and in earlier cases which will be found cited in Lord Selborne's dissentient judgment in *Occleston v. Fullalove* (l), that a prospective gift to future illegitimate children of a woman is wholly void as *contra bonos mores*: but it would seem from the judgment of the

when unborn
children can
take under
this descrip-
tion.

(b) *Blagrove v. Coore*, 27 Beav. 138.

(c) *Wilkinson v. Adam*, 1 Ves. & Beam. 422, 454; *Lepine v. Bean*, L. R. 10 Eq. 160; *Barlow v. Orde*, L. R. 3 P. C. 164; *Hill v. Crook*, L. R. 6 H. L. 265; *Laker v. Hordern*, 1 O. D. 644.

(d) *Barnett v. Tugwell*, 31 Beav. 232.

(e) *Hill v. Crook*, L. R. 6 H. L. 265; *Re Humphries*, 24 C. D. 691; *Re Bryon*, 30 C. D. 110; *Re Haseldine*, 31 C. D. 511; *Re Hastie's Trusts*, 35 C. D. 728; *Re Hall*, 35 C. D. 551; *Re Horner*, 37 C. D. 695; *Seale-Hayne v. Jodrell*, [1891] A. C. 304; *Re Harrison*, [1894] 1 Ch. 561; *Re Deakin*, [1894] 3 Ch. 565; *Re Parker*, [1897] 2 Ch. 208; *Re Walker*, [1897] 2 Ch. 238; *Re Smilter*, [1903] 1 Ch. 198; *Re Corsellis*, [1906] 2 Ch. 316; *Re Helliwell*, [1916] 2 Ch. 580; *Re Bleckly*, [1920] 1 Ch. 450. The Court will, if the context shows the intention, bring in as next of kin persons who were not in the eye of the law next of kin: *Re Wood*, [1902] 2 Ch. 542.

(f) *Shaw v. Gould*, L. R. 3 H. L. 55; *Dorin v. Dorin*, L. R. 7 H. L. 568; *Re Ayles' Trusts*, 1 C. D. 282; *Ellis v. Houstoun*, 10 C. D. 236.

(g) L. R. 6 H. L. 265, 282.

(h) L. R. 7 H. L. 568.

(i) *Re Pearce*, [1914] 1 Ch. 254.

(j) Co. Lit. 3, b; *Pratt v. Mathew*, 22 Beav. 328.

(k) 22 Beav. 328.

(l) L. R. 9 Ch. 147.

majority of the Court in that case that such a gift is not void as *contra bonos mores* provided it be so couched as to avoid any enquiry as to the paternity of the child, *e.g.*, a provision for all the children born of the body of a particular woman while cohabiting with the testator. And James, L. J., points out that the addition to the suggested gift of the words "of whom I shall be the reputed father" would not avoid a gift such as that suggested, because it would involve no enquiry into paternity, but only into that reputation which springs from acknowledgment, conduct and life as distinguished from gossip or scandal as to the actual paternity (*m*). So where a testator who had formed an illicit connection with M. E. M., made by Will a gift to certain illegitimate children by name "and all and every the other children and child which may be born of the said M. E. M. previous to or of which she may be pregnant at the time of my death," it was held that illegitimate children born after the date of the Will and *in esse* at the time of the death of the testator were entitled to have the benefit of the gift (*n*).

Illegitimate children unbegotten at the time of the testator's death cannot under any circumstances be entitled under the description of "child" or "children" (*o*).

If the bequest be to a natural child, of which a particular woman is enceinte, *without reference to any person as the father*, no difficulty exists, and the legacy will be supported (*p*). So where the testator expresses his *belief* that a natural child *en ventre sa mère* is his, and, proceeding on such belief, provides for it, the bequest will be sustained; for in such case, as the testator chooses to *assume* the fact, and to act on the foundation of his *belief*, there is no uncertainty in the object; since, whether it was or was not the child of the testator, he meant to provide for it, as the child of the mother described (*q*).

(*m*) See observations of Sir George Jessel in *Re Goodwin's Trusts*, L. R. 17 Eq. 345; and of Cotton, L. J., in *Re Bolton*, 31 C. D. 542—552.

(*n*) *Re Hastie's Trusts*, 35 C. D. 728; *Re Loveland*, [1906] 1 Ch. 542.

(*o*) *Holt v. Sindrey*, L. R. 7 Eq. 170.

(*p*) *Gordon v. Gordon*, 1 Meriv. 141; *Evans v. Massey*, 8 Price, 22; *Dawson v. Dawson*, 6 Madd. 292; *Crook v. Hill*, 3 C. D. 773; *Ebborn v. Fowler*, [1909] 1 Ch. 578. So also where a testatrix who was never married describing herself as a spinster bequeathed her property in trust for her children: *Clifton v. Goodbun*, L. R. 6 Eq. 278.

(*q*) *Gordon v. Gordon*, 1 Meriv. 141; *Holt v. Sindrey*, L. R. 7 Eq. 170; *Occleston v. Fullalove*, L. R. 9 Ch. 147, 161.

Again, it is a rule (though not an invariable one), that where- ever the general description of children in a Will will include legitimate children, it cannot also be extended to illegitimate children; in other words, where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only will take. Thus in *Bagley v. Mollard* (r), a testator devised a leasehold in trust for his "grand-child, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares: Elizabeth was illegitimate, and William had no other child: and it was held by Sir J. Leach, M. R., that Elizabeth did not take any share of the residue. So in *Fraser v. Pigott* (s), John Fraser bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not: And after certain specific bequests, he gave the residue of his personal estate to his sons William and John, as tenants in common; but if either of them should die in his (the testator's) lifetime, the moiety of such deceased son should go to his children; but if both of his sons should die in his lifetime, then he gave such residue to and among all their children as tenants in common: The testator's two sons died in his lifetime, one leaving legitimate and illegitimate children. the other illegitimate children only: And it was held by Lord Lyndhurst, C. B., that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son took the residue, and that the illegitimate children of the first-mentioned son took no interest.

If, however, the testator plainly refers to given individuals, and it be clear, from the language he uses, that they are described by the word "children" (e.g., where in enumerating his children, he names one who is a bastard, and then makes a gift

Rule that where there are legitimate children to answer description they only will take:

except where testator clearly refers to given individuals and describes

(r) 1 Russ. & M. 581; *Megson v. Hindle*, 15 C. D. 198; *Re Hall*, 35 C. D. 551. In the case of *Re Humphries*, 24 C. D. 691, North, J., recognized the rule in *Bagley v. Mollard*, but held that there were other facts beyond the description of the illegitimate child as the eldest daughter of the testator's daughter, which indicated the intention that the illegitimate child should be included in the description of the children of his daughter.

(s) 1 Younge, 354. Shadwell, V.-C., dissented from this decision. in *James v. Smith*, 14 Sim. 216. And as far as it affirmed the admission of the illegitimate children to a share in the residue, it has been regarded as overruled: *Re Overhill's Trust*, 1 Sm. & G. 362.

them as
"children."

to his "said children"), there is no rule of law which precludes the Court from giving effect to the intentions of the testator (*t*). So, where the gift was to the "children" of "the late A. B.," who had died leaving two children, of whom one was legitimate, and the other illegitimate, the illegitimate child was held to be included, otherwise it was impossible to give a meaning to the word "children" in the plural (*u*). So, where the gift was to the "children" of one whom the testator mentioned as already dead, and who left none but illegitimate children, they have been deemed to be intended as the objects of the gift; for otherwise there would be nothing for the Will to operate on (*x*).

"Children"
of foreigner
means those
legitimate by
law of
domicil.

A bequest to children of a foreigner must be construed to mean his legitimate children, *i.e.*, those legitimate by the law of their father's domicile (*y*). But a child born before the marriage of its father and mother cannot be legitimated by their subsequent marriage unless the father was domiciled in a country whose laws allowed such legitimation both at the time of the marriage which gave the child the status of legitimacy, and at the time of the birth on which it took from its putative father the potentiality of being legitimated (*z*).

2. "Grand-
children:"

2. "Grandchildren:" Lord Northington seems to have been of opinion (*a*), that the word "grandchildren" would, without further explanation comprehend *great* grandchildren. But the

(*t*) *Evans v. Davies*, 7 Hare, 498; *Meredith v. Farr*, 2 Y. & Coll. Ch. C. 525; *Owen v. Bryant*, 2 De G. M. & G. 697; *Hartley v. Tribber*, 16 Beav. 510; *Worts v. Cubitt*, 19 Beav. 421; *Tugwell v. Scott*, 24 Beav. 141; *Allen v. Webster*, 2 Giff. 177; *Cook v. Whitley*, 7 De G. M. & G. 494, by Lord Cranworth. It would seem that in these cases the words are treated as a *descriptio personarum* and not as a designation of a class: *Re Wells' Estate*, L. R. 6 Eq. 599; *Barlow v. Orde*, L. R. 3 P. C. 164, 188.

(*u*) *Gill v. Shelley*, 2 Russ. & M. 336; *Leigh v. Byron*, 1 Sm. & G. 485; *Edmunds v. Fessey*, 29 Beav. 233; *Re Humphries*, 24 C. D. 691; *Re Bleckly*, *ante*, p. 863. In these cases it should seem that there ought to be extrinsic evidence that the testator knew the state of the family: *Re Herbert's Trusts*, 1 Johns. & H. 121.

(*x*) *Woodhouselee v. Dalrymple*, 2 Meriv. 419; 2 De G. M. & G. 703; *Hill v. Crook*, L. R. 6 H. L. 265; *Re Eve*, [1909] 1 Ch. 796. The construction, it would seem, would be different if the parent were alive: for then legitimate children might be born before the testator's death. See *Gabb v. Prendergast*, 1 Kay & J. 439.

(*y*) *Re Andros*, 24 C. D. 637. And so a child legitimate by the law of its father's domicile but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England under the Statute of Distributions: *Re Goodman's Trusts*, 17 C. D. 266.

(*z*) *Re Grove*, 40 C. D. 216.

(*a*) 2 Eden, 196.

case of *Orford v. Churchill* (b) is an authority to the contrary: when great grandchildren included in this description. And it seems but reasonable, that if the word "children" does not include grandchildren (as we have seen), the term "grandchildren" should not comprise children next to them in descent (c). The several distinctions which have been mentioned in regard to the enlargement of the word "children" seem applicable to a bequest to grandchildren: so that if it appear from the Will, that the word "grandchildren" was not used in its proper sense, but for the purpose of embracing all the descendants of the persons described, it will have this effect.

A grandchild *by marriage* is not entitled under the description of "grandchildren" (d). Grandchild by marriage.

3. "Wife:" "Husband:" Before the Wills Act it was held that a bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the Will, and is not to be extended to an after-taken wife (e). 3. "Wife," "Husband."

But this point cannot arise since the Act, for the second marriage would revoke this Will (f). A similar question may, however, occur in respect of a bequest by a testator to the wife of another person.

It is stated that if a joint estate be made of land to husband and wife, and to a third person, in this case the husband and wife have in law in their right but a moiety, and the third person shall have as much as the husband and wife, viz., the other moiety: and the cause is that the husband and wife are Joint estate in land to husband and wife and to a third person.

(b) 3 Ves. & Beam. 59.

(c) See the judgment of Lord Cottenham, in *Sanderson v. Bayley*, 4 Mylne & Cr. 60; and *Waring v. Lee*, 8 Beav. 247.

(d) *Hussey v. Berkeley*, 2 Eden, 196.

(e) *Garratt v. Niblock*, 1 Russ. & M. 629. The fact that the gift to the wife of A. is connected with a gift to his children which is so expressed as to include his children by any wife is not enough to show that a future wife was intended to be benefited: *Re Burrows' Trusts*, 10 L. T. 184; *Re Griffiths' Policy*, [1903] 1 Ch. 739; *Re Coley*, [1903] 2 Ch. 102, where it was held that the word "wife" must bear its *prima facie* meaning of wife existing at the date of the Will, unless that meaning is controlled by the context. See also *Firth v. Fielden*, 22 W. R. 622. *Peppin v. Bickford*, 3 Ves. 570; *Longworth v. Bellamy*, 40 L. J. Ch. 513; and *Re Drew*, [1899] 1 Ch. 336, are cases where the description of wife was held to apply to a second wife. *Borcham v. Bignall*, 8 Ha. 131, and *Re Bryan's Trusts*, 2 Sim. (N. S.) 103, are cases where the testator was held to have intended a *persona designata*. Compare also *Re Parrott*, 33 O. D. 274; *Radford v. Willis*, L. R. 7 Ch. 7.

(f) See *ante*, p. 134.

but one person in law (*g*). But it is stated in the judgment of the Privy Council, in *Dias v. De Livera* (*h*), that any indication, however slight, of an intention that each shall take separately, has been held to defeat the application of this doctrine. The cases on the subject are extremely contradictory, and will be found set out and reviewed in the cases of *Re Jupp* (*i*) and *Re Dixon* (*k*), in which Kay, J., and North, J., seem to have arrived at opposite conclusions, the former in favour of a strict application of the doctrine, the latter against it. The case of *Re Dixon* has been recently followed in *Re Jeffery* (*l*).

The question whether a woman can take as a legatee by the name of the "wife" of such a one, when in truth she is not his lawful wife, will be considered hereafter (*m*). Sometimes a person who answers the description in the Will has ceased to answer that description at the time of the testator's death, or at the time when the gift was to take effect. Thus, in *Re Morrieson* (*n*), a testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease, in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again. It was held that the woman was not entitled to the income of the son's share. In this case Kay, J., expressed his dissent from *Bullmore v. Wynter* (*o*), in which case a testator devised property to his daughter for life, and after her death in trust for any husband with whom she might intermarry, if he should survive her for his life. The daughter married the defendant and was divorced from him on his petition, and he married again and survived her, and it was held by Fry, J., that the defendant, although no longer the husband of the daughter, was entitled to the property for his life.

4. "Nephews and nieces."

4. "Nephews and Nieces:" The principles already stated with respect to the restriction and enlargement of the terms

(*g*) Co. Litt. 187, *a*.

(*h*) 5 App. Cas. 123, 136.

(*i*) 39 C. D. 148.

(*k*) 42 C. D. 306.

(*l*) [1914] 1 Ch. 375.

(*m*) See *Giles v. Giles*, 1 Keen, 165; *post*, p. 911.

(*n*) 40 C. D. 30.

(*o*) 22 C. D. 619.

“children” and “grandchildren” apply to the words “nephews and nieces.” Therefore *great* nephews and *great* nieces are not ordinarily to be considered as comprehended in that description (*p*): Nor will the expression “grand-nephews and nieces” include the children of grand-nephews and nieces (*q*). But in these cases also, the more enlarged sense will be attributed to the expression, when the context indicates the intention of the testator so to use it (*r*). It includes a child of a brother or sister of the half-blood (*s*). But not the nephews or nieces of the husband of the testatrix (*t*).

(*p*) *Falkner v. Butler*, Ambl. 514; *Shelley v. Bryer*, 1 Jacob. 207; 4 Mylne & Cr. 60; *Thompson v. Robinson*, 27 Beav. 480; *Re Blower's Trusts*, L. R. 6 Ch. 351. And the case is not altered where the testator has used words in the plural, and there happens to be only one person to whom the term is properly applicable: *Crook v. Whitley*, 7 De G. M. & G. 490.

(*q*) *Waring v. Lee*, 8 Beav. 247.

(*r*) *James v. Smith*, 14 Sim. 214; *Stringer v. Gardiner*, 27 Beav. 35; 4 De G. & J. 468; *Weeds v. Bristow*, L. R. 2 Eq. 333.

(*s*) *Grieves v. Rawley*, 10 Hare, 63.

(*t*) *Smith v. Lidiard*, 3 K. & J. 252; *Merrill v. Morton*, 17 C. D. 382; notwithstanding the testatrix has, in another part of the Will, called a legatee her niece, who was only her husband's niece: *Re Green*, [1914] 1 Ch. 134. See also *Thompson v. Robinson*, 27 Beav. 486; *Wells v. Wells*, L. R. 18 Eq. 504. In *Grant v. Grant*, L. R. 5 C. P. 380, 727, the Court of Common Pleas held that the word “nephew” might include the son of the testator's wife's brother, and, there being a nephew of the same name, son of testator's own brother, admitted evidence to show the testator's intention on the ground that these circumstances gave rise to a latent ambiguity as to which of the two persons was intended by the testator. This evidence was of course only admissible on the assumption that both claimants fell within the description “nephew.” *Grant v. Grant* (*ubi supra*) has, however, been disapproved by Sir G. Jessel in *Wells v. Wells*, L. R. 18 Eq. 504, on the authority of *Re Blower's Trusts*, L. R. 6 Ch. 351, and of *Sherratt v. Mountford*, L. R. 8 Ch. 928. *Grant v. Grant* is also disapproved of in *Merrill v. Morton*, 17 C. D. 382, and in *Re Taylor*, 34 C. D. 255; and must now be taken to be overruled: *Re Green*, [1914] 1 Ch. 134. The result would seem to be that the words “nephews” and “nieces” will be construed in the primary sense if there is any person or class answering the description, and the Court will go no further, unless it is shown that there is another person or class of persons answering the description; in which case extrinsic evidence of intention will be admissible to remove the latent ambiguity and show which of the persons or classes is intended. Where, however, the words are not strictly applicable to any person, then evidence of intention will not be admissible, but only evidence of the surrounding circumstances and the testator's knowledge. It will be observed that in *Sherratt v. Mountford*, in which the claim of the nephews and nieces of the testator's wife was sustained, there were no nephews and nieces in the primary sense. In *Re Jodrell*, 44 C. D. 590, the persons described as the testator's nieces were his wife's nieces, not his own, and some of the persons described as his cousins were illegitimate relatives; it was held by the Court of Appeal (and the decision was affirmed by the House of Lords, [1891] A. O. p. 304) that the words “relatives

However, a bequest of a residue by a married man to his niece, and all other his nephews and nieces on both sides, will include the nephews and nieces of his wife (*u*). So will a bequest to nephews and nieces where the testator has none of his own (*x*).

5. "Cousins." 5. "Cousins:" It might seem, that the word "cousins," if used *simpliciter*, would include cousins of every description. But the Court is frequently obliged to put a restricted sense on the general expression. Thus in *Caldecott v. Harrison* (*a*), a testator, in his Will, gave several legacies, and mentioned several persons as his cousins, and every person there called a cousin was, in fact, a first cousin: By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime: The testator left several first cousins and children of first and second cousins, and one first cousin once removed: And Sir L. Shadwell, V.-C., held that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime; his Honour being of opinion that, from the context, it appeared that by the word "cousins" the testator meant his first cousins, simply and strictly, without any qualification. And it has been held by Lord Cranworth, C., that when the testator says nothing more than "cousins," he means *first* cousins (*b*).

Though, formerly, some doubt on the subject prevailed, it may now be taken that the same principles apply in determining

named" included relatives by affinity as well as consanguinity, and illegitimate as well as legitimate relations: *Re Helliwell*, [1916] 2 Ch. 580. In *Re Gue* (1892), W. N. p. 132, the Court of Appeal expressed a doubt whether *Smith v. Lidiard* and *Wells v. Wells* were not overruled by *Re Jodrell*. In *Re Cozens*, [1903] 1 Ch. 138, however, it was held by Swinfen Eady, J., that no hard and fast rule can be said to have been laid down by *Re Jodrell* on the one hand, or by *Smith v. Lidiard*, *Wells v. Wells*, or *Merrill v. Morton* on the other, but that the question depends in every case on the particular Will and the evidence. Nephews and nieces of the half-blood are *prima facie* entitled to share in a gift to "my own nephews and nieces": *S. C.*

(*u*) *Frogley v. Phillips*, 30 Beav. 168.

(*x*) *Hogg v. Cook*, 32 Beav. 641; *Sherratt v. Mountford*, L. R. 8 Ch. 928.

(*a*) 9 Sim. 457.

(*b*) *Stoddart v. Nelson*, 2 Jur. (N. S.) 27, in which case it was also decided that "first cousins" and "cousins-german" meant the same thing.

who are entitled under a bequest to first or second cousins as apply in the case of a bequest to children or grandchildren. That is to say, as Sir G. Jessel, M. R., puts it in the case of *Re Parker* (c): "You are not without a context to alter the meaning of well-known terms that have a definite meaning." In this case it is pointed out that the doubt on the construction of these gifts to cousins has arisen through a misunderstanding of the decision in the case of *Mayott v. Mayott* (d), in which case Lord Kenyon, M. R., held that, there being a gift to the first and second cousins of the testator who, at the date of the Will, had no second cousins, the phrase "second cousins" must be interpreted to mean all persons related as nearly as second cousins. Sir G. Jessel goes on to point out that the cases of *Silcox v. Bell* (e), and *Charge v. Goodyer* (f), were decided on a misinterpretation of the decision of *Mayott v. Mayott*, viz., that this case decided that a bequest to second cousins included all persons of the same degree of relationship, whereas, all that case really decided was that, in the particular circumstances, and there being no second cousins, the testator must have intended to benefit all relations as near as second cousins.

In all cases, however, later than *Charge v. Goodyer* decisions have followed the ordinary rule of construction. Thus it was held by Lord Cottenham in *Sanderson v. Bayley* (g) (reversing a decision of Sir L. Shadwell, V.-C.), that a bequest to the testator's "first cousins or cousins-german" does not include first cousins once removed. And in *The Corporation of Bridgnorth v. Collins* (h), it was held that a first cousin once removed is not entitled under a bequest to "second cousins." Again, in *Re Parker* (i), the Court of Appeal (affirming Jessel, M. R.) held, in a case where a testator left first cousins, second cousins and children and grandchildren of first cousins, that a bequest to "second cousins" did not include the children and grandchildren of the first cousins. Under a bequest to "my cousins and half-cousins" it was held that first cousins, first cousins once removed, and second cousins were entitled (j).

(c) 15 C. D. 528, 538; S. C., 17 C. D. 262.

(d) 2 Bro. C. C. 125.

(e) 1 Sim. & Stu. 301.

(f) 3 Russ. 140.

(g) 4 M. & Cr. 56.

(h) 15 Sim. 541.

(i) 15 C. D. 528; 17 C. D. 262.

(j) *Re Chester*, 84 L. J. Ch. 78.

Where, however, there is no individual of the class named, the word "cousins" will be construed in the more extended sense (*k*): as also will the word "cousin" as applied to a named legatee if there is no person of the name to whom the word cousin, in its primary sense, is applicable (*l*).

So, too, it has been held that "cousin" in such a case may be understood in a popular sense as the wife of a cousin (*m*).

(B.) *Who are entitled under the description of* 1. "Heirs:" 2. "Issue:" 3. "Descendants:" 4. "Relations:" 5. "Next of Kin:" 6. "Family:" 7. "Executors and Administrators," or "Legal Representatives," or "Personal Representatives."

Terms which applied to realty give an estate tail, give the absolute interest if applied to personalty.

It may be observed, in the first place, that it is an established rule of construction, with respect to Wills of personalty, that where personal estate is given, in terms which, if applied to real estate, would create an estate tail, the property so bequeathed vests absolutely in the first taker, and, consequently, devolves at his death on his executors and administrators, whether he has issue or not (*n*). Hence, generally speaking, where realty and

(*k*) *Slade v. Fooks*, 9 Sim. 386; *Re Bonner*, 19 C. D. 201; *Wilks v. Bannister*, 30 C. D. 512.

(*l*) *Re Taylor*, 34 C. D. 255.

(*m*) *Re Taylor*, *ubi supra*.

(*n*) *Elton v. Eason*, 19 Ves. 78; *Lyon v. Mitchell*, 1 Madd. 475; *Ward v. Bevil*, 1 Younge & Jerv. 525; *Byng v. Lord Strafford*, 5 Beav. 558; *Williams v. Lewis*, 6 H. L. C. 1020; *Bennett v. Bennett*, 2 Drewr. & Sm. 160; *Russell v. Campbell*, 2 Russ. & M. 390; *S. C.*, in Dom. Proc., *sub nom. Candy v. Campbell*, 8 Bligh, 469. The cases in which the words of a Will will be so construed as to create an estate tail have been materially reduced by the provisions of sect. 29 of the Wills Act (1 Vict. c. 26): the effect of which provisions as to Wills made on or after 1st Jan., 1838, is that in any devise or bequest of real or personal estate words which are open to three constructions—viz., the death of the legatee in the lifetime of the tenant for life without having issue living at the legatee's death: the death of the legatee in like manner without having issue living at the death of the tenant for life: or the death of the legatee in the lifetime of the tenant for life followed by an indefinite failure of issue, are not to be construed as meaning indefinite failure of issue. The result of which is that cases of implication of an estate tail from words importing a failure of issue will not often arise, and cases of a bequest of personal property in words which, if applied to real estate would by express terms create an estate tail, are not likely to arise except in cases where realty and personalty are included in one gift. It is to be observed, however, that the statute only applies in cases where the words may support either a want or failure of issue of any person in the testator's lifetime, or at his death, or an indefinite failure of issue, and therefore has no application where the words *must* import an indefinite failure of

personalty are included in one gift, if the legatee takes an estate tail in the former, he takes the latter absolutely (o).

Hence a legacy "to A. and to the heirs of his body," or 1. "Heirs:" "to A., to be secured to him and the heirs of his body," is an absolute bequest to A. (p), though a legacy "to A. and his heirs (say children)," is only a legacy to A. for life, remainder to his children (q). Again, there has already (r) been occasion to show, that if a term of years be devised to one for life, and afterwards to the heirs of his body, the whole term will, generally speaking, vest absolutely in him (s). Again, a devise of

Legacy to A.
and the heirs
of his body:

issue. In other words, the statute only applies where there is ambiguity: *Dawson v. Small*, L. R. 9 Ch. 651. It must be remembered, moreover, that the generality of this rule may possibly be qualified by a doubt whether the rule in *Shelley's Case*, 1 Rep. 93, B., has any application to personalty. See *Smith v. Butcher*, 10 C. D. 113, where Jessel, M. R., refused to apply that rule to a Will dealing with personalty. But Bacon, V.-C., in the case of *Comfort v. Brown*, 10 C. D. 146, says, in reference to an argument that the rule did not apply to personal estate: "*De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, and *Gittings v. McDermott*, 2 M. & K. 69, are instances, and there are hundreds of other instances in which the rule has been applied to personal estate." *Smith v. Butcher* was, however, followed in *Re Bishop and Richardson's Contract*, [1899] 1 I. R. 71. So it has been said that the rule in *Wild's Case*, 6 Rep. 17, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail, has no application to personalty: *Audsley v. Horn*, 1 De G. F. & J. 226, ante, p. 856, n. (t). Besides all these particular limitations of the generality of the rule that words which would create an estate tail in realty will vest personalty absolutely in the first taker, it must be remembered that this rule, which, so far as regards personalty, seems to be a mere rule of construction, is never allowed to override the intention to be gathered from the whole of the words of the Will: *Symers v. Jobson*, 16 Sim. 267; *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Knight v. Ellis*, 2 Bro. C. C. 570; *Ex parte Wynch*, 5 De G. M. & G. 188.

(o) *Donn v. Penny*, 19 Ves. 544; *Dunk v. Fenner*, 2 Russ. & M. 557; *Simmons v. Simmons*, 8 Sim. 22. But the blending of realty and personalty in one gift is not conclusive if it appear from the whole Will that it was not the intention to give the personalty to an indefinite succession of persons. See *Herrick v. Franklin*, L. R. 6 Eq. 593; *Smith v. Butcher*, 10 C. D. 113. The rule that the same words need not receive the same construction, though appearing in one clause, when applied to realty and personalty respectively, is established by *Forth v. Chapman*, 1 P. Wms. 667; *Keay v. Boulton*, 25 C. D. 212. See ante, pp. 845, 846.

(p) *Crawford v. Trotter*, 4 Madd. 361; ante, p. 521; *Harris v. Davis*, 1 Coll. 416. See, however, *Re Lowman*, [1895] 2 Ch. 348, as to the decision of Knight-Bruce, V.-C., in *Harris v. Davis*.

(q) *Crawford v. Trotter*, 4 Madd. 361; ante, pp. 856, 857.

(r) Ante, p. 522.

(s) *Theebridge v. Kilburne*, 2 Ves. Sen. 233; *Garth v. Baldwin*, 2 Ves. Sen. 646; *Verulam v. Bathurst*, 13 Sim. 374. But the context may demonstrate that by the words "heirs of the body," is meant "children": *Symers v. Jobson*, 16 Sim. 267.

freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, *their heirs, executors, administrators, and assigns*, gives A. an estate tail in the former, and an absolute interest in the latter (t).

It must be observed, that several cases occur in the books, where words creating an estate tail, according to the established rules of law, have been held to be narrowed by inconsistent limitations in other parts of the Will: Thus children have been held entitled, as purchasers, under the description of "heirs of the body," where the directions of the Will are inconsistent with construing the word in its usual acceptation as a word of limitation; as a legacy to A. for life, and then "to the heirs male of his body, *as tenants in common*" (u). But these cases, it is submitted, must be considered as much shaken, if not entirely overruled, by the decision of the House of Lords in *Jesson v. Wright* (x).

Where there are in a Will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken: the effect of the failure of an earlier gift being to accelerate, not to destroy, the latter gift (y).

With respect to a legacy to "the heirs of A.:" When the word "heirs" is used to denote succession or substitution (z), it may be understood, as it is in the case of a legacy to A. and heirs, to mean such person or persons as would legally succeed to the property according to its nature and quality: Thus, in *Vaux v. Henderson* (a), a legacy of personal property to A.,

(t) *Kinch v. Ward*, 2 Sim. & Stu. 409. See also *Dunk v. Fenner*, 2 Russ. & M. 557.

(u) *Jacobs v. Amyatt*, 4 Bro. C. C. 542.

(x) 2 Bligh, 1, where Lord Redesdale says: "That the general intent should override the particular is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." See also *Dunk v. Fenner*, 2 Russ. & M. 557; and *ante*, p. 843.

(y) *Re Lowman*, [1895] 2 Ch. 348. The principle extends to freeholds: *Re Dunstan*, [1918] 2 Ch. 304.

(z) Generally a bequest of personal estate to one or his heirs is a sufficient indication that the word "heirs" is used to denote succession or substitution: *Gittings v. McDermott*, 2 M. & K. 69; *Doody v. Higgins*, 2 K. & J. 729. So, again, a direction for distribution amongst heirs is an indication that the testator by "heirs" meant next of kin: *Low v. Smith*, 2 Jur. 344; *Re Steevens' Trusts*, L. R. 15 Eq. 110.

(a) 1 Jac. & Walk. 388, note (c).

successive
limitations
in favour of
persons
absolutely:

legacy to
"the heirs
of A.:"
or "to my
heirs:"

"and failing him by decease before me, to his heirs," was decreed to belong to the next of kin of A. living at the time of the testator's death, A. having died before that event (*b*). More correctly stated, the rule would seem to be that the word "heir" in a gift of personal property may readily be taken to mean such persons as would have been entitled under the Statute of Distributions to succeed to the personal property of the deceased, in case he had died intestate (*c*), including, therefore, a widow; and excluding the husband, in case of a bequest to a woman, and in the event of her death to "her heirs" (*d*).

But where the word is used, not to denote succession or substitution, but to describe a legatee, and there is no context to explain it otherwise, it would seem that there is no reason to depart from the natural and ordinary sense of the word heir (*e*). Thus, in *Mounsey v. Blamire* (*f*), the testatrix devised, *inter alia*, a real estate to a person not her heir-at-law; and by a codicil she gave a pecuniary legacy "to my heir." At her death three persons were co-heirs-at-law: And Sir J. Leach, M. R., held that they, and not her next of kin, were entitled

(*b*) See also *Holloway v. Holloway*, 5 Ves. 403; *Gittings v. McDermott*, 2 M. & K. 69; *Jacobs v. Jacobs*, 16 Beav. 557; *Low v. Smith*, 2 Jur. 344, *coram* Kindersley, V.-C.; *Re Gamboa's Trusts*, 4 K. & J. 756; *Re Newton's Trusts*, L. R. 4 Eq. 171; *Re Philips' Will*, L. R. 7 Eq. 151; *Finlason v. Tatlock*, L. R. 9 Eq. 258; *Re Steevens' Trusts*, L. R. 15 Eq. 110; and cf. *In the goods of Dixon*, 4 P. D. 81.

(*c*) See, for instance, *Wingfield v. Wingfield*, 9 C. D. 658, and *Keay v. Boulton*, 25 C. D. 212, in which it was held that where there is a gift of realty and personalty together to children "or their heirs," the word "heirs" must be read in a twofold meaning—viz., *heir-at-law* as regards the realty and *next of kin* as regards the personalty. But yet in each case the question must be whether there is anything to control the ordinary meaning of the word "heir" so as to prevent the heir taking the personalty as a *persona designata*, and to raise the inference that the next of kin are to take in substitution or in succession. This seems the ground upon which *Smith v. Butcher*, 10 C. D. 113, was decided, which at first sight is difficult to reconcile with *Wingfield v. Wingfield*.

(*d*) *Doody v. Higgins*, 2 K. & J. 738; *Re Porter's Trusts*, 4 K. & J. 188; *Parsons v. Parsons*, L. R. 8 Eq. 260; cf. also *Re Bromby*, [1900] W. N. 187. The heirs take as tenants in common in the proportion fixed by the statute: *Jacobs v. Jacobs*, 16 Beav. 557; *Re Porter's Trusts*, *ubi supra*.

(*e*) So the words "next lawful heir," in an ultimate gift of real and personal estate are to be construed in their strict sense as to personalty: *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, 557; *Haslewood v. Green*, 28 Beav. 1; *Smith v. Butcher*, 10 C. D. 113; *In the goods of Dixon*, 4 P. D. 81.

(*f*) 4 Russ. Chan. Cas. 384. The reported disapproval of this case by Jessel, M. R., in *Smith v. Butcher*, 10 C. D. 113, 114, if correct, clearly does not go to the authority of the decision as a whole.

to the legacy. *A fortiori*, the heir, properly and technically, speaking, may take personal property bequeathed to him by that description where the intention of the testator in his favour appears upon the construction of the whole Will (*g*), as where it is blended in the gift with real estate.

legacy to
"my heirs or
next of kin."

In a case where the testator bequeathed, by an unattested Will, the residue of his estate of every kind to "my next of kin or heir-at-law, whom I appoint my executor," it was holden that the bequest was void, and that the property, which was entirely personal, must be distributed according to the Statute of Distributions (*h*). So, in a case where a testator, who had long resided in India, gave a legacy to "A. B., who resided at P. when I left England, or to his heirs, executors, administrators or assigns, for ever;" and A. B. died in the testator's lifetime, Sir J. Leach, V.-C., held, that the bequest was void for uncertainty (*i*).

2. "Issue:"

A bequest to "A. and his issue" (*k*), as it will clearly pass an estate tail in real property, so it will give to A. the absolute interest in a personal legacy (*l*). So a legacy to all the children

legacy to
"A. and his
issue:"

(*g*) *Gwynne v. Muddock*, 14 Ves. 488; *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524.

(*h*) *Lowndes v. Stone*, 4 Ves. 649. But where a testatrix bequeathed personalty "to the heirs or next of kin of A. deceased," it was held to be a gift to one class—viz., the next of kin of A. according to the statute: *Re Thompson's Trusts*, 9 C. D. 607. It seems that Jessel, M. R., distinguished this case from *Lowndes v. Stone* (*ubi supra*) on the ground that in that case the word used was "heir-at-law," but in this case the testatrix spoke of "heirs" as a class.

(*i*) *Waite v. Templer*, 2 Sim. 524, recognized by Lord Brougham, in *Gittings v. McDermott*, 2 M. & K. 78, but disapproved of by Lord St. Leonards in *De Beauvoir v. De Beauvoir*, 3 H. L. C. 557, and, *semble*, overruled by the Lords Justices, *Re Walton*, 20 Jur. 363; 8 De G. M. & G. 173; *post*, p. 882, note (*o*), and p. 894.

(*k*) In devises of real estate "issue" is *primâ facie* a word of limitation, and not of purchase: *Roddy v. Fitzgerald*, 6 H. L. C. 323, 879; *Re Simcoe*, [1913] 1 Ch. 552; *Re Lawrence*, [1915] 1 Ch. 129. But even when used in respect of real property "issue," although primarily a word of limitation, is often construed as "children," and a word of purchase: *Morgan v. Thomas*, 8 Q. B. D. 575; affirmed on appeal, 9 Q. B. D. 643. See *post*, p. 878. It may be doubted whether in respect of personal property "issue" is even *primâ facie* a word of limitation, because, in the case of a bequest of personalty, the construction is governed rather by intention than by principles derived from the Law of Tenure: *Ex parte Wynch*, 5 De G. M. & G. 188.

(*l*) *Donn v. Penny*, 19 Ves. 547; *Crawford v. Trotter*, 4 Madd. 361; *Martin v. Swannell*, 2 Beav. 249; *Parkin v. Knight*, 15 Sim. 83; *Beaver v. Nowell*, 25 Beav. 551. The tendency of modern authorities, however, is to construe such words as giving an interest to the issue as legatees where the context offers any reason for so doing. See *ante*, p. 872, note (*n*). The words may, if so construed, be held to

of A. and their issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of A. as are living at the testator's death (*m*). So a bequest to several persons share and share alike, as tenants in common, and to the issue of their respective bodies, but in case of the death of any or either of them without issue, then the share of him or them so dying should go to the survivors or survivor equally, share and share alike, and to the issue of their respective bodies, gives the legatees an absolute interest with benefit of survivorship in case any of them died without issue at their death (*n*). Where a testator bequeathed all his personal property, not before disposed of by his Will, unto his trustees, in trust for his five sons, "and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age," it was held by the House of Lords that this bequest was an absolute gift to each of the testator's sons living at the time of his decease, of the fifth part of the property thus bequeathed; and the Lord Chancellor (Brougham) said, it was clear that the issue of any one of the sons would, at the death of the testator, take *by substitution*, if the son himself should at that time be dead (*o*). And it has been held (as in the instance of a legacy to A. and the heirs of his body (*p*)), that the construction of a legacy to "A. and his issue," as an absolute gift to A., is not to be varied by superadded words, *primâ facie* denoting distribution: as for example, where the gift is to A. and his issue, male and female, to be divided equally between

to several persons, and the issue of their respective bodies:

to them and their respective issue, to take *per stirpes*:

to A. and his issue as tenants in common:

give the ancestor and issue interests as joint tenants or tenants in common, as the case may be, but in cases where the bequest is of personalty there is a strong disinclination to hold that the parents and children take concurrently. The words may be construed as an alternative and original gift: *Re Coulden*, [1908] 1 Ch. 320.

(*m*) *Butter v. Ommancey*, 4 Russ. Chanc. Cas. 70. See also *Re Stanhope's Trusts*, 27 Beav. 201.

(*n*) *Lyon v. Mitchell*, 1 Madd. 467.

(*o*) *Pearson v. Stephen*, 2 Dow. & Cl. 328; *Gibbs v. Tait*, 8 Sim. 132; *Turner v. Capel*, 9 Sim. 158; *Dick v. Lacy*, 8 Beav. 214; *Hedges v. Harpur*, 9 Beav. 479; *S. C.*, 3 De G. & J. 129; *post*, pp. 881, 882.

(*p*) *Ante*, p. 873.

to A. for life,
and after his
death, to his
issue :

them (q). As to the effect of a legacy to A. for life, and after his death to his issue, there has been much controversy. In *Knight v. Ellis* (r), Lord Thurlow held that such a bequest gave the legatee an estate for life only, and that the issue would take as purchasers. It was at one time supposed that this case had been overruled (s). But it has been fully sustained by the decision of the Court of Appeal in *Ex parte Wynch* (t).

when all de-
scendants are
entitled under
the descrip-
tion of
"issue"
employed as
a word of
purchase :

When the description "issue" is employed in a Will as a word of purchase, it will, in its ordinary import, comprise all those who can claim as descendants from or through the person to whose issue the bequest is made, *i.e.*, grandchildren and great-grandchildren, as well as children: and in order to restrain this usual sense of the word, a clear intention must appear upon the Will (u).

(q) *Tate v. Clarke*, 1 Beav. 100. See *Ex parte Wynch*, 5 De G. M. & G. 188, 210, where Lord Cranworth comments on this case.

(r) 2 Bro. C. C. 570.

(s) See *Att.-Gen. v. Bright*, 2 Keen, 57; *Jordan v. Lowe*, 6 Beav. 350; *Bird v. Webster*, 1 Drewr. 340.

(t) 5 De G. M. & G. 188; *Goldney v. Crabb*, 19 Beav. 338. See also *Waldron v. Boulter*, 22 Beav. 284; *Re Andrew's Will*, 27 Beav. 608; *Jackson v. Calvert*, 1 J. & Hem. 235; *Herrick v. Franklin*, L. R. 6 Eq. 593. See further on the subject of treating the word "issue" as a word of purchase, and not of limitation, *Clay v. Pennington*, 7 Sim. 370; *Cursbam v. Newland*, 2 Bing. N. C. 58; *S. C.*, 4 M. & W. 101; *Ryan v. Cowley*, Ll. & G. temp. Sugd. 7; *Slater v. Dangerfield*, 15 M. & W. 263. So also in *Montgomery v. Montgomery*, 3 J. & L. 47, Lord St. Leonards lays it down as clearly settled law, that a devise to A. for life, with remainder to his issue, with superadded words of limitation inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. This case seems to be followed by Lord Hatherley in *Kavanagh v. Morland*, Kay, 16, and both cases were approved in *Morgan v. Thomas*, 8 Q. B. D. 575; 9 Q. B. D. 643. Compare however, the observations of Lord Cranworth in *Parker v. Clarke*, 6 D. M. & G. 104, 109. At all events the issue will take as purchasers where there are words of distribution in addition: *Lees v. Moseley*, 1 Y. & C. 589. It does not seem, however, apposite to this Treatise to discuss all the different cases in which the word "issue" has been construed in a restricted sense as a word of purchase and not of limitation in cases of devise of real estate, but rather to call attention to those cases in which words held to create an estate tail in realty have received a different construction in respect of personal estate.

(u) Thus in *Hobgen v. Neale*, L. R. 11 Eq. 48, a bequest to testator's wife for life and afterwards equally between all his brothers and sisters *nominatim*, but in case any of them should die leaving issue, then the part or share of him, her, or them so dying should go to his or their respective issue, it was held that "issue" must be read in its largest sense, there being nothing about issue taking the parent's share or the like to restrict the sense. See, however, *Hume v. Lloyd*, 47 L. J. Ch. 775. See also *Davenport v. Hanbury*, 3 Ves. 257; *Freeman v. Parsley*, *ibid.* 421; *Leigh v. Norbury*, 13 Ves. 340; *Bernard v. Montague*, 1 Mer. 434; *Daltzell v. Welch*, 2 Sim. 319; *Head v. Randall*,

But, to use the words of Lord Eldon in *Sibley v. Perry* (x), if, upon fair reasoning, deduced from the words of the Will, all the contents, and design, and tenor of it, as manifested by its contents, show the word "issue" to be meant in a more restrained sense, that sense may be given to it; and his Lordship proceeded to decide that, in the Will before the Court, from its being coupled with the word "parent," the correlative term "issue" must be taken in the sense of "children" (y).

2 Y. & C. 231; *Evans v. Jones*, 2 Coll. 516; *Robinson v. Sykes*, 23 Beav. 40; *Re Jones's Trusts*, *ibid.* 242; *Maddock v. Legg*, 25 Beav. 531; *Waldron v. Boulter*, 22 Deav. 284; *Re Corrie's Will*, 32 Beav. 426; *Re Corlass*, 1 C. D. 460; *Re Warren's Trusts*, 26 C. D. 208. "Offspring" is synonymous with "issue" in a gift to any "child or offspring"; *Thompson v. Beasley*, 3 Drew. 7; but has been confined to "children" in an executory trust to settle: *Lister v. Tidd*, 29 Beav. 618.

(x) 7 Ves. 531. The principle contained in these words is not assailed in any subsequent cases; but *Sibley v. Perry* has often been treated as laying down a general rule that whenever you find "issue" and "parent" in collocation, "issue" will be cut down to mean "children" of the person described as "parent." Lord Justice James, however, in *Ralph v. Carrick*, 11 C. D. 873, 882, says: "It is, I think, much to be regretted that *Sibley v. Perry* was ever made a leading case, because according to the report of what Lord Eldon himself said in that case, it is to my mind perfectly clear that he never intended to lay down any general rule or canon of construction, but was dealing only with the peculiar language of the Will in that particular case. He found one clause in which he considered that the testator had used the word 'issue' to signify children only, and then he said I give the same meaning to the word 'issue' in other parts of the Will. It is, however, I think, settled, but rather by the case of *Pruen v. Osborne*, 11 Sim. 132, than by *Sibley v. Perry*, that, as a general rule, when you find a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut down to mean children." *Re Timson*, *infra*.

(y) This restricted construction was adopted in *Pruen v. Osborne*, 11 Sim. 132, and *Re Timson*, [1916] 2 Ch. 362, where the direction was that the issue should take their parents' share; and again in *Carter v. Bentall*, 2 Beav. 551, where trustees were directed to transfer proceeds of sale to the issue of testator's daughter in equal shares, and if only one child then to such child; and again in *Bryden v. Willett*, L. R. 7 Eq. 472, where the words were "such respective issue, if more than one child." *Re Hopkins' Trusts*, 9 C. D. 131, is a similar case. *Pride v. Fooks*, 3 De G. & J. 252, and *Re Wyndham's Trusts*, L. R. 1 Eq. 290, were cases where the meaning of the word issue was confined to the issue who could take under a preceding gift; and it is to be observed that the restricted construction may be excluded by the terms of a following gift over, that is, that where there is a gift over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons: *Ross v. Ross*, 20 Beav. 645, the principle of which was affirmed by the Court of Appeal in *Ralph v. Carrick*, 11 C. D. 873, both of which cases were distinguished in *Re Timson*, [1916] 2 Ch. 362; and see *Re Burnham*, [1918] 2 Ch. 196. See also *Horsepool v. Watson*, 3 Ves. 383; *Hampton v. Brandwood*, 1 Madd. 388; *Orford v. Churchill*, 3 V. & B. 67; *Swift v. Swift*, 8 Sim. 168; *Peel v. Callow*, 9 Sim. 372; *Ryan v. Cowley*, Ll. & G. temp. Sugd. 7; *Ridgeway v. Munkittrick*, 1 Dr. & W. 84; *Goldie*

when children only.

3. "Descendants:"

3. "Descendants." Under this description is comprised every individual proceeding from the stock or family, referred to by the testator (*z*). Thus, when the testator gave 4,000*l.* to "the *descendants* of Francis Ince," it was held by Sir Thomas Clark, M. R., that great-grandchildren were entitled with grandchildren to shares of the fund, since they answered the description of descendants of Francis Ince; and that the distribution must be *per capita* (*a*). So where the testatrix directed her personal property to be divided equally between the *descendants* of Thomas Fairbank; and at her death there were three sons and eleven grandchildren of Thomas Fairbank, it was held by Lord Thurlow, that as well the grandchildren as children were entitled to the fund, and *per capita* (*b*).

"Eldest male lineal descendants."

It was held by Lord Eldon in *Oddie v. Woodford* (*c*) (and his decision was confirmed by the House of Lords), that the designation of "eldest male lineal descendant" was inapplicable to a male person claiming in part through a female. Again, in *Bernal v. Bernal* (*d*), it was decided by Lord Cottenham, in the construction of a Dutch Will, that "male children" meant "male descendants," and that male descendants meant, according to the English Law (and, as it should seem, according to the Dutch Law also), descendants claiming through males only (*e*).

"Male descendants."

v. Greaves, 14 Sim. 348; *Buckle v. Fawcett*, 4 Hare, 536; *Farrant v. Nichols*, 9 Beav. 327; *Williams v. Teale*, 6 Hare, 250; *Edwards v. Edwards*, 12 Beav. 97; *Pope v. Pope*, 14 Beav. 591; *Bradshaw v. Melling*, 19 Beav. 417; *Re Heath's Settlement*, 23 Beav. 193; *Maynard v. Wright*, 26 Beav. 285; *McGregor v. McGregor*, 1 De G. F. & J. 63; *Smith v. Horsfall*, 25 Beav. 628; *Stevenson v. Abingdon*, 31 Beav. 305; *Tatham v. Vernon*, 29 Beav. 604; *Baker v. Bayldon*, 31 Beav. 209; *Fairfield v. Bushell*, 32 Beav. 158; *Re Corrie's Will*, 32 Beav. 426; *Marshall v. Baker*, 31 Beav. 608; *Lanphier v. Buck*, 2 Drew. & Sm. 484; *Martin v. Holgate*, L. R. 1 H. L. 175; *Heasman v. Pearse*, L. R. 7 Ch. 275; *Re Birks*, [1900] 1 Ch. 417; *Re Woolley*, [1903] 2 Ch. 206, 210.

(*z*) See the observations of Lord Eldon in *Wright v. Atkyns*, 1 Turn. & Russ. 162. The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children: *Ralph v. Carrick*, 11 C. D. 873.

(*a*) *Crossly v. Clare*, Ambl. 397; *S. C.*, 3 Swanst. 320, note to *Brandon v. Brandon*.

(*b*) *Butler v. Stratton*, 3 Bro. C. C. 367; *Ralph v. Carrick*, 11 C. D. 873; *Re Harper*, [1914] 1 Ch. 70.

(*c*) 3 Mylne & Cr. 584.

(*d*) *Ibid.* 559.

(*e*) *Lywood v. Kimber*, 29 Beav. 38, accord. But see also *Sayer v. Bradley*, 5 H. L. C. 873; *post*, p. 889. In the great case of *Thellusson v. Rendlesham*, 7 H. L. C. 429, the contest was, whether under the words "eldest male lineal descendant," the eldest in line or the eldest

Where a testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him *by lineal descent*; and he had no wife or issue at the time of making his Will nor afterwards; and he died leaving several first cousins, his next of kin; it was held that they were entitled to the residuary estate both real and personal; for that the words "lineal descent" did not necessarily mean lineal descent *from the testator* (f).

"Relations
by lineal
descent:"

Very often when there is in a Will a bequest to a parent coupled with a bequest to children, issue, or offspring, as purchasers a question arises whether the parent and children take as joint tenants or as tenants in common, or whether the parent takes a life estate with an estate in remainder to the children. Sometimes the parent *and* the children are spoken of, sometimes the parent *or* the children. When the words are "the parent *and* the children" the rule would seem to be that a joint tenancy is created if nothing can be found to indicate a different intention (g), but slight special circumstances have often been held to justify the construction settling the property upon the parent for life, especially in cases where the testator stands in a position of duty to provide for the maintenance of the parent and children, *e.g.*, a husband (h).

When a bequest is made to "A. *or* his children," or to "A. *or* his issue," or "A. *or* his heirs," or "A. *or* his descendants," a question may arise, whether the children, or issue, or descendants, are to take concurrently with A., or merely in substitution for him, in case of his death before the testator (i). In *Newman v. Nightingale* (k), the testator gave 500*l.* "to the sole use of N. *or* of her children for ever:" And Lord Thurlow

Whether a
gift to "A.
or his issue,"
or to "A. *or*
his children,"
or to "A. *or*
his heirs"
(and the like)
is concurrent
or substituti-
tional.

in years was entitled, and the House of Lords decided in favour of the eldest in line.

(f) *Craik v. Lamb*, 1 Coll. 489.

(g) *Newill v. Newill*, L. R. 7 Ch. 253 (reversing *Malins v. V.-C.*, L. R. 12 Eq. 432), following *De Witte v. De Witte*, 11 Sim. 256; *Bustard v. Saunders*, 7 Beav. 92; *Bibby v. Thompson*, 32 Beav. 647; *Buffar v. Bradford*, 2 Atk. 220; *Beales v. Crisford*, 13 Sim. 592; *Mason v. Clarke*, 17 Beav. 126.

(h) *Dawson v. Bourne*, 16 Beav. 29; *Jefferly v. De Vitre*, 24 Beav. 296; *Audsley v. Horn*, 26 Beav. 195; *Ward v. Grey*, 26 Beav. 485; *Crockett v. Crockett*, 2 Phillim. 553; *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Re Owen's Trusts*, L. R. 12 Eq. 316; *Combe v. Hughes*, L. R. 14 Eq. 415.

(i) See *post*, Pt. III. Bk. III. Ch. II. § v., as to preventing the lapse of legacies by words of substitution.

(k) 1 Cox, 341.

held, that N. took only an interest for life in the 500*l.*, and that the children were to take it among them after her death (*l.*). But in *Crooke v. De Vandes* (*m*), Lord Eldon held that a bequest to two persons, *or* their children, gave the children an interest by way of substitution only, and not a concurrent interest. So in *Montagu v. Nucella* (*n*), a testator bequeathed a sum of stock to each of five nephews and nieces, *or* to their respective child or children; should any die, without child, such share to revert to the residuary legatee: and Lord Gifford, M. R., held, that the true construction was, to vest the legacies absolutely in the nephews and nieces who survived the testator, and that the child or children of nephews or nieces took only as substitutes for their parent or parents dying in the testator's lifetime. And many similar decisions have subsequently occurred, where, in case of direct gifts to legatees *or* their children, or to legatees *or* their issue, or to them *or* their heirs, the children, &c., have been held to take only by way of substitution (*o*). But these cases must be carefully distinguished from those where the Will shows a general intention in favour of a class, and a particular intention in favour of individuals of the class to be selected by another person, and the particular intention fails from the selection not being made. In such cases, as the Court cannot supply the execution of the power of selection, it gives the fund to the whole class equally, in order to carry into effect the general intention. This distinction is illustrated by the case of *Penny v. Turner* (*p*), where there was a gift to the testator's three sisters, *or* their children, as his mother should, by deed or Will, appoint: And Lord Cottenham held, that, in default of appointment, this was a gift to the whole class of the sisters *and* their children equally; not on the

(*l*) See also *Richardson v. Spraag*, 1 P. Wms. 433; *Eccard v. Brooke*, 2 Cox, 213; *Parkin v. Knight*, 15 Sim. 83; *Horridge v. Ferguson*, Jac. 583; *Maude v. Maude*, 22 Beav. 290.

(*m*) 9 Ves. 197.

(*n*) 1 Russ. Chanc. Cas. 165.

(*o*) See *Gibbs v. Tait*, 8 Sim. 132; *Turner v. Capel*, 9 Sim. 158; *Price v. Lockley*, 6 Beav. 180; *Dick v. Lacy*, 8 Beav. 214; *Salisbury v. Petty*, 3 Hare, 86; *Whitcher v. Penley*, 9 Beav. 477; *Speakman v. Speakman*, 8 Hare, 180; *Chipchase v. Simpson*, 16 Sim. 485; *Gibson v. Hale*, 17 Sim. 129; *Penley v. Penley*, 12 Beav. 547; *Blundell v. Chapman*, 33 Beav. 648, and *post*, p. 962. But a gift to a legatee, *or* his heirs, *or* assigns, is an absolute gift to him: *Re Walton*, 2 Jur. (N.S.) 363. *coram* the Lords Justices; *S. C.*, 8 De G. M. & G. 173. See also *Greenway v. Greenway*, 2 De G. F. & J. 128. *Re Clerke*, [1915] 2 Ch. 301; *Re Whitehead*, [1920] 1 Ch. 155.

(*p*) 2 Phil. Ch. C. 493.

ground that "or" was to be construed "and," but that it was referable only to the power given to the mother of selection from among the class; and as that power had not been exercised, the whole class must take equally (*q*).

Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class and no gift over in default of appointment, the Court is not bound, without more, to imply a gift to the class in default of the power being exercised. In order to imply a gift there must be a clear indication in the Will that the testator intended the power to be regarded as in the nature of a trust, so that the class or some of the class should take (*r*).

A gift to "survivors of a class *and* the issue of such survivor, such issue to take the parents' *share* only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift (*s*).

4. "Relations." When a legacy is given by a testator "to my relations" generally, without enumerating any of them, the Court will direct the money to be paid to such of his relations as would have been entitled under the Statute of Distributions, if he had died intestate (*t*). So where the testator bequeathed 50*l*.

4. "Relations:"

(*q*) See accord. *Longmore v. Broom*, 7 Ves. 124; *Burrough v. Philcox*, 5 M. & Cr. 73, 92; *Re White's Trusts*, Johns. 656; *Izod v. Izod*, 32 Beav. 242. But see *contra*, *Jones v. Torin*, 6 Sim. 255. As to when the class is to be ascertained, see *Re White's Trusts*, Johns. 656, 659; *Re Phené's Trusts*, L. R. 5 Eq. 346. The word "or," however, is not infrequently read "and," even apart from the case of a devise of real estate to "A. or his heirs," or to "A. or the heirs of his body," where by a technical rule "or" is read "and," and the devisee takes an estate in fee or an estate in tail, as the case may be. In such cases "or" is generally read as "and," on the assumption that the testator used the word "or" by mistake for the word "and," and it is necessary that this should appear clearly from the general context of the Will. See *King v. Cleveland*, 26 Beav. 26; *Re Philips' Will*, L. R. 7 Eq. 151; *Burt v. Hellyar*, L. R. 14 Eq. 160; *Wingfield v. Wingfield*, 9 C. D. 658; *Re Clerke*, [1915] 2 Ch. 301.

(*r*) *Re Weeke's Settlement*, [1897] 1 Ch. 289, following *Healy v. Donnelly*, 3 Ir. O. L. Rep. 213.

(*s*) *Parsons v. Coke*, 4 Drewr. 296.

(*t*) *Roach v. Hammond*, Prec. Chanc. 401; *Thomas v. Hole*, Cas. temp. Talb. 251; *Withorn v. Harris*, 2 Ves. Sen. 527; *Green v. Howard*, 1 Bro. C. C. 31; *Rayner v. Mowbray*, 3 Bro. C. C. 234; *Brandon v. Brandon*, 3 Swanst. 319; *Wright v. Atkins*, 1 Turn. & Russ. 161; *Ham's Trust*, 2 Sim. N. S. 106; *Lees v. Massey*, 3 De G. F. & J. 113. The distribution must, it seems, be *per stirpes*, that is, the objects, as well as the proportions, will be determined according to the statute: 2 Jarm. on Wills, 6th edit. p. 1629; but see *Tiffin v. Longman*, 15 Beav. 275. A gift of residue to be distributed "to my relatives, share and share alike, as the law directs," has been held to mean a dis-

to each of his "relations by blood or marriage," Lord Rosslyn held, that the word "relations" must be confined to relatives entitled under the Statute of Distributions, and to persons who had married relatives entitled under that Act (*u*).

"near relations:"
"poor relations:"

The same rule applies where the bequest is to "near relations" (*x*). So where the bequest is to "poor relations" (*y*), or "my most *necessitous*" or "*poorest*" relations (*z*), no persons are entitled except such as are within the statute; unless the legacy be given to establish a *charity* for poor relations (*a*).

So where a power is given to a person to dispose of a fund "among my relations, in such manner as he shall think proper," the appointment cannot be in favour of any relative who is not within the statute (*b*). But though a party to whom a power is thus delegated to fix the amount of the share that *each* relation shall take, without entrusting him with the choice of the objects, is confined within the limits of the statute, it is otherwise when a power is committed to an individual to distribute the fund among *such* of the "relations" of the testator as he shall, in his discretion, select: for in such a case, the individual is not restrained in the exercise of such discretion to relations within the Statute of Distributions (*c*). Where, indeed, the Court is called on to distribute, in failure of the person so empowered, it will confine itself according to the

tribution under the Statute of Distributions, *per stirpes* and not *per capita*: *Fielden v. Ashworth*, L. R. 20 Eq. 410; cf. *Re Richards*, [1910] 2 Ch. 74.

(*u*) *Devisme v. Mellish*, 5 Ves. 529. Where a testator, after giving legacies to various persons describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that, if the whole of his property made more than the whole amounts mentioned in his Will, it should be divided "amongst my relations in proportion to their separate amounts," it was held by Bacon, V.-C., that only such of the legatees as were blood relations were entitled under the residuary gift: *Hibbert v. Hibbert*, L. R. 15 Eq. 372. See also *Seale-Hayne v. Jodrell*, [1891] A. C. 304.

(*x*) *Whithorn v. Harris*, 2 Ves. Sen. 527.

(*y*) *Brunsdon v. Woolridge*, 1 Dick. 380.

(*z*) *Widmore v. Woodrooffe*, Ambl. 636.

(*a*) *White v. White*, 7 Ves. 423; *Att.-Gen. v. Price*, 17 Ves. 371. A relation who was poor at the death of the testator, and has become rich before the period of distribution, is not entitled: *Mahon v. Savage*, 1 Sch. & Lefr. 111.

(*b*) *Pope v. Whitcombe*, 3 Meriv. 689; *Re Deakin*, [1894] 3 Ch. 565, 575.

(*c*) *Mahon v. Savage*, 1 Scho. & Lefr. 111; *Spring v. Biles*, 1 T. R. 435, *in notis*; *Forbes v. Ball*, 3 Meriv. 437; *Grant v. Lynam*, 4 Russ. Chanc. Cas. 292.

degrees mentioned in the statute, as well in the latter case as in the former (*d*): but a difference was supposed to exist, that where the donee of the power had authority to select the objects, the fund shall be distributed among the testator's next of kin, *in existence at the death of the donee of the power* (*e*): but when the donee of the power was entrusted with a discretion merely in apportioning the shares, the property shall be divided among the next of kin *living at the testator's death* (*f*).

But this doctrine is founded on an inaccurate report of the case of *Pope v. Whitcombe*, and it was held by Romilly, M. R., to be a mistake, and that in both instances the next of kin living at the death of the donee of the power were entitled (*g*).

No person can regularly answer the description of "relations" but those who are akin to the testator by *blood*; consequently, relations by marriage are not included in a bequest to "relations" generally: A wife, therefore, cannot regularly claim under a bequest to her husband's relations, nor a husband as a relation to his wife (*h*).

relations by marriage not included in bequest to "relations" generally:

Where the description employed is "nearest relations," the Statute of Distributions shall not ascertain the persons entitled: but whosoever is the *nearest* will be entitled, to the exclusion of more remote relations who could have claimed under the statute in case of intestacy: As where a testator directed his residuary property to be "equally distributed amongst his *nearest* surviving relations," and died leaving a brother, and sisters, and nephews and nieces, the children of a deceased brother: Sir William Grant held, that the brothers and sisters, as *nearest* of kin to the testator, were exclusively entitled (*i*). If the bequest be in the singular number, "my nearest relation," and there be several persons nearest of kin, in the same degree, the fund must be divided between them; and the word "relation," like "heir," must be taken in such case as *nomen collectivum* (*k*).

"nearest relations."

"Relation" in the singular number.

(*d*) *Grant v. Lynam*, 4 Russ. Chanc. Cas. 292. See *Ray v. Adams*, 3 M. & K. 237; *Salisbury v. Denton*, 3 Kay & J. 529. See also *Re Caplin*, 29 Jur. 383, where the power was to appoint "unto such of my relations and friends," as the donee of the power should direct.

(*e*) *Harding v. Glyn*, 1 Atk. 469; *S. C.*, cited 5 Ves. 501; *Cruwys v. Colman*, 9 Ves. 325. But see *Cole v. Wade*, 16 Ves. 27.

(*f*) *Pope v. Whitcombe*, 3 Meriv. 689.

(*g*) *Finch v. Hollingworth*, 21 Beav. 112.

(*h*) *Davies v. Baily*, 1 Ves. Sen. 84; *Worsley v. Johnson*, 3 Atk. 758; *Harvey v. Harvey*, 5 Beav. 134. See *Craik v. Lamb*, 1 Coll. 489, 494.

(*i*) *Smith v. Campbell*, 19 Ves. 400; *Re Nash*, 71 L. T. 5.

(*k*) *Marsh v. Marsh*, 1 Bro. C. C. 294; *Pyot v. Pyot*, 1 Ves. Sen. 337. *Re Bulcock*, [1916] 2 Ch. 495.

"Relations"
of a particular
name.

When the bequest is to relations of a particular *name*, as "my nearest relations of the name of Pyot," the word "name" has been considered equivalent to the expression "stock;" so that where a female relation was one of the nearest of kin, and entitled to the described name by *birth*, her claim was sustained to a share of the legacy, although she had lost the name of Pyot by her marriage (*l*).

Where the bequest was "to the first and nearest of my kindred, being *male, and of my name and blood*," it was held, that a person who was first and nearest of blood to the testator, and a male, but not originally of the testator's name, though he assumed it by the king's licence, could not succeed to his claim (*m*).

5. "Next of
kin:"

5. "Next of kin." A man's "kindred," in the proper signification of the word, means such persons as are related to him *by blood*: and, accordingly, relations by *marriage* are generally incapable of bringing themselves within the description of "next of kin" in a Will: and (as in the case just mentioned, of "relations") neither husband nor wife can be entitled under a bequest to the "next of kin" of either of them (*n*). But it was observed by Lord Eldon, in *Garrick v.*

who are
"kin:"

(*l*) *Pyot v. Pyot*, 1 Ves. Sen. 336; *Carpenter v. Bott*, 15 Sim. 606.

(*m*) *Leigh v. Leigh*, 15 Ves. 92. See also *Barlow v. Bateman*, 2 Bro. C. C. 272, Toml. edit. But where the bequest was to the immediate or direct descendants of my brother or nephew who shall "bear the name" of R. G. only, it was held that under the circumstances of that case "bear the name" meant "use the name:" and that therefore the bequest was not confined to the persons entitled to that name by birth: *Re Roberts*, 19 C. D. 520.

(*n*) *Nichols v. Savage*, cited in *Bailey v. Wright*, 18 Ves. 52; *Garrick v. Lord Camden*, 14 Ves. 372. Nor can a widow, as such, take under a limitation to the next of kin of her husband, according to the *Statute of Distributions*: *Cholmondeley v. Lord Ashburton*, 6 Beav. 86. *Secus*, under a bequest to such *persons* as would have been entitled under the Statute in case of intestacy: *Jenkins v. Gower*, 2 Coll. 537; and see *Ash v. Ash*, 33 Beav. 187; *Starr v. Newberry*, 23 Beav. 436. But a husband would not take under a bequest "to such persons as would be entitled, as next of kin or otherwise, under the Statute of Distributions" to the personal estate of his wife; for he is not entitled under any of the statutes, but paramount thereto: *Milne v. Gilbert*, 2 De G. M. & G. 715; 5 De G. M. & G. 510. Where the bequest is to the persons who would have been entitled to the personal estate of a wife, in case she had died intestate and without being married, the husband only is excluded and not the children of the marriage: *Norman's Trust*, 3 De G. M. & G. 965; *Pratt v. Mathew*, 22 Beav. 328; 8 De G. M. & G. 522. Where the testator refers to the Statute of Distributions in such a manner as shows that the persons who are to take, are to take according to the title given by the statute, they will take as tenants in common: *Downes v. Bullock*, 25 Beav. 54;

Lord Camden (o), that it was competent to, and required from, the Court, to look through the whole Will, and to see whether, from the whole, an intention was manifested to include the wife among those who were to be taken more strictly as next of kin, a description *primâ facie* excluding her (p).

Persons related to the testator by the half-blood are equally of "kin" to him with those of the whole-blood, and equally entitled, with respect to the description of "nearest of kin" in a Will, to every preference over the more remote kindred of the testator (q).

It remains to consider to what kindred the description "next of kin" extends. Mr. Justice Buller in *Phillips v. Garth* (r) decided, that under a bequest of a residue to the testator's executors "to be equally divided amongst his *next of kin*, share and share alike," all his next of kin were entitled who could have claimed under the statute in case of an intestacy. But this decision has been overruled (s), and it is now established that if the words are "next of kin," and there is nothing to show that the testator had reference to the Statute of Distributions, or to a division as in case of intestacy, the *nearest* of kin only are entitled (t). Hence a surviving brother of the intestate will be entitled, in exclusion of the children of a deceased brother or sister (u). *A fortiori*, the nearest of kin will

to what kin the description "next of kin" extends.

Bullock v. Downes, 9 H. L. O. 1; *Re Nightingale*, [1909] 1 Ch. 385. But where there is no such reference they will take as joint tenants: *Lucas v. Brandreth*, 28 Beav. 274; *Re Greenwood's Will*, 3 Giff. 390.

(o) 14 Ves. 382.

(p) See also *M'Leroth v. Bacon*, 5 Ves. 159, for an instance where a relation *by marriage* may be included in the word "family." Where some of the testator's children are illegitimate the context may show an intention that by next of kin those who would have been next of kin if the testator's children had been legitimate should take: *Re Wood*, [1902] 2 Ch. 542; *ante*, p. 863, n. (e).

(q) *Collingwood v. Pace*, 1 Vent. 424; *Brown v. Wood*, Allyn, 36; *ante*, p. 332.

(r) 3 Bro. C. O. 64.

(s) *Elmsley v. Young*, 2 M. & K. 780; *Withy v. Mangles*, 10 Cl. & F. 215; *Rook v. Att.-Gen.*, 31 Beav. 313; *Avison v. Simpson*, Johns. 43.

(t) *Smith v. Campbell*, 19 Ves. 404; see *Re Richards*, [1910] 2 Ch. 74. And the law is the same where a bequest is to the "next of kin in blood": *Halton v. Foster*, L. R. 3 Ch. 505; *Re Gryll's Trust*, L. R. 6 Eq. 589; *Re Gray's Settlement*, [1896] 2 Ch. 802. See also the cases cited in note (k), *ante*, p. 885. And see further *Nicholls v. Hariland*, 1 Kay & J. 504. Under a devise of land "to my nearest of kin by way of heirship," it was held that the heir was entitled, though not next of kin: *Williams v. Ashton*, 1 Johns. & H. 115.

(u) See *Brandon v. Brandon*, 3 Swanst. 312; *Elmsley v. Young*, 2 M. & K. 780.

be alone entitled under a bequest to "next of kin in equal degree" (x).

Accordingly, where by the marriage settlement of Emily M., the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was to "*such person or persons as at the time of her death should be her next of kin*;" and she died leaving her husband and a child of the marriage and her own father and mother surviving, it was held by the House of Lords in *Withy v. Mangles* (y), that her father, mother, and child were entitled, under the limitation, to the 10,000*l.* in joint tenancy: for that the words "next of kin" used *simpliciter* must be construed in their natural meaning of nearest in proximity of blood, and, by the law of England, the child and the parent are equal in degree of proximity, *i.e.*, both are in the first degree, though the child (and the lineal descendants of the child) is preferred in the succession to property (z), and consequent grant of administration (a).

Again, in *Cooper v. Denison* (b), a testator bequeathed the residue of his effects to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then at his wife's death, one-third of the capital was to go according to her Will, and the other two-thirds were to be paid "*to my other the next of kin of my paternal line*:" He died, possessed of personal estate only, leaving his wife and daughter, and three brothers surviving: The daughter died, leaving children, before her mother: On the death of the mother, the question ultimately was, who were to take the two-thirds, as being at the death of the widow the testator's "next of kin of his paternal line." It was contended for the grandchildren, that as being the sole next of kin *ex parte paternâ*, according to the *Statute of Distributions*, they were exclusively entitled to the fund: On the part of the brothers, it was argued that the computation of degrees of kindred in this case ought to be made in conformity with the Canon Law, according to which the brothers of the testator were nearer of blood than his grandchildren, and were therefore exclusively entitled as his next of kin: But Shadwell, V.-C., decided against the exclusive claim on either side, being of

(x) *Wimbles v. Pitcher*, 12 Ves. 433.

(y) 10 Cl. & F. 215, affirming the decree of Lord Langdale, 4 Beav. 358.

(z) See *post*, Pt. III. Bk. IV. Ch. I. § III.

(a) *Ante*, p. 333.

(b) 13 Sim. 290.

opinion, that, as the question related to personal estate, the mode of computation ought to be in conformity to the civil law, according to which the grandchildren and brothers were in equal degree of kindred: And his Honour further held, that the brothers, as well as the grandchildren, were entitled, for that the Court must not look at the Statute of Distributions, but must inquire who were the next of kin, irrespective of that statute (c).

Where a testator directed that the interest and dividends of the remainder of his stock should be invested, so as to accumulate until the end of twenty-one years from his death, when the whole was to be disposed of towards his "then nearest of kin in the male line in preference to the female line," it was held by Wood, V.-C., and by the Lords Justices and also by the House of Lords, that the son of the testator's paternal uncle was not entitled in preference to the testator's sister (d).

Nearest of kin in the male line.

The natural and ordinary meaning of the phrase "next of kin" is next of kin at the death of the persons whose next of kin is spoken of: And this construction ought to prevail whether the Will speaks of the testator's own next of kin, or of the next of kin of some other person, unless the context demonstrates that such a construction would counteract the apparent intention of the testator (e). And the rule is not varied by the circumstance that the bequest to the next of kin is preceded by a bequest of the fund to a tenant for life (f), or that the

"Next of kin" means next of kin at the death of him whose next of kin are spoken of:

(c) As to mode of calculating degrees of consanguinity in the collateral line, see *ante*, p. 331.

(d) *Boys v. Bradley*, 10 Hare, 389; 4 De G. M. & G. 58; *S. C.*, 5 H. L. C. 875, *nomine Sayer v. Bradley*.

(e) *Gundry v. Pinniger*, 1 De G. M. & G. 505, 506; *Downes v. Bullock*, 25 Beav. 54; *Bullock v. Downes*, 9 H. L. C. 1; *Holloway v. Radcliffe*, 23 Beav. 163; *Eagles v. Le Breton*, L. R. 15 Eq. 148; *Mortimore v. Mortimore*, 4 App. Cas. 448. See *Re Rees*, 44 O. D. 484; and cf. *Hood v. Murray*, 14 A. C. 124; *Re Soper*, [1912] 2 Ch. 467.

(f) Cf. *Hood v. Murray*, *ubi supra*. The rule was applied by Romilly, M. R., in *Cable v. Cable*, 16 Beav. 507, where the bequest was to the testator's wife for life, with remainder to his children living at his death; and if there should be none (which happened), *then*, and in such case, the fund should belong to the persons who should *then* be entitled to take out administration to his effects; His Honour being of opinion that the word "*then*" must be construed as an adverb referring to the event and not to the time. A similar construction of the word "*then*" prevailed in *Ware v. Rowland*, 2 Phil. Ch. O. 635, 637; *Gundry v. Pinniger*, 14 Beav. 94; 1 De G. M. & G. 502; *Wheeler v. Adams*, 17 Beav. 417; *Bullock v. Downes*, *ubi supra*; *Re Wilson*, [1907] 2 Ch. 572; *Re Winn*, [1910] 1 Ch. 278. The rule also prevails where the word "*then*," the adverb of time, is used not in connection with the description of the class (as in *Re Sturge and Great*

bequest is contingent on an event which may or may not happen (g).

bequest to
"next of kin,"
after a pre-
vious bequest
for life to one
of the next of
kin or to the
sole next of
kin.

Where, indeed, the tenant for life is himself one of the next of kin, it was at one time thought that the rule was inapplicable, and that the next of kin intended to take must be the next of kin living at the death of the tenant for life. But the law is now settled by a long series of cases, that if there is nothing in the context of the Will, or the circumstances of the case, to control the natural meaning of the testator's words, his next of kin *living at his death* will be entitled; and, that if the tenant for life happens to be one of such next of kin, *or to be solely such next of kin*, he is not on that account to be excluded (h). But where the context demonstrates that the person or persons to take under the description of next of kin is a person or persons, to be ascertained at a future period, or that it is the testator's intention to exclude the tenant for life from the description of next of kin, the expression must be necessarily understood as meaning the testator's next of kin, *living at the death of the tenant for life* (i).

Western Rail. Co., 19 C. D. 444): but in connection with the time at which the estate is to come into being: *Mortimer v. Slater*, 7 C. D. 322; affirmed by H. L. *sub nom. Mortimore v. Mortimore*, 4 A. C. 448; *Re Hutchinson*, [1920] W. N. 180. But in other cases the word "then," by the context, has been held to refer, as an adverb of time, to the period at which the prior life interest would determine: *Long v. Blackall*, 3 Ves. 486; *Re Edgington's Trust*, 3 Drew. 202; *Olney v. Bates*, *ibid.* 319; *Pinder v. Pinder*, 28 Beav. 41; *Wharton v. Barker*, 4 Kay & J. 483. Thus in *Re Sturge and Great Western Rail. Co.*, 19 C. D. 444, where a testator gave property in trust for the benefit of the persons who at a time subsequent to his own death should by virtue of the Statutes of Distribution be his next of kin, the class was held to be an artificial class to be ascertained on the hypothesis that the testator lived up to and died at the subsequent period of time. See also *Holgate v. Jennings*, 34 Beav. 79; *Gill v. Barratt*, 29 Beav. 372; *Re Helsby*, 84 L. J. Ch. 682; *Re Mellish*, [1916] 1 Ch. 562. See *Moss v. Dunlop*, Johns. 490, as to the effect of the words "for the time being." See also *Booth v. Vicars*, 1 Coll. 6; post, p. 902.

(g) *Bird v. Luckie*, 8 Hare, 301.

(h) *Holloway v. Holloway*, 5 Ves. 399; *Doe v. Lawson*, 3 East, 278; *Pearce v. Vincent*, 1 Cr. & M. 598; 2 Bing. N. C. 328; 2 Keen, 230; *Stert v. Platel*, 5 Bing. N. C. 434; *Elmsley v. Young*, 2 M. & K. 780; *Jennings v. Newman*, 10 Sim. 219; *Smith v. Smith*, 12 Sim. 317; *Urquhart v. Urquhart*, 13 Sim. 613; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & F. 215; *Nicholson v. Wilson*, 14 Sim. 549; *Jenkins v. Gower*, 2 Coll. 537; *Wilkinson v. Garrett*, *ibid.* 643; *Allen v. Thorp*, 7 Beav. 72, 75; *Lasbury v. Newport*, 9 Beav. 376; *Seifferth v. Badham*, 9 Beav. 370; *Say v. Creed*, 5 Hare, 580, 587; *Baldwin v. Rogers*, 3 De G. M. & G. 649, 656, 657; *Re Barber*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 Beav. 556; *Lee v. Lee*, 1 Dr. & Sm. 85. See *Clarke v. Hayne*, 42 O. D. 529.

(i) *Briden v. Hewlett*, 2 M. & K. 90; *Butler v. Bushnell*, 3 M. & K.

A bequest to the next of kin of a person who is dead at the date of the Will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin, as regards the period of ascertaining who are the persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the Will would naturally be the persons to take (*j*). A gift by a widow "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate *and without leaving a widow him surviving*," was, however, held by Stirling, J., by virtue of the concluding words, to be a gift to the next of kin of the husband at his death and not to that of the testatrix (*k*).

Bequest to next of kin of person dead at date of Will.

A gift to the nearest of kin of a deceased husband and wife is a gift to the nearest of kin of each of them at the death of the testator, and not a gift to the nearest of kin of them both jointly (*l*).

Next of kin of husband and wife.

In *Scott v. Moore* (*m*), a fund was bequeathed to Elizabeth B. for life, and after her death to her children; and if she died without leaving a child, the testator directed that the fund should *be considered as part of his personal estate, and should be disposed of in a due course of administration*; and he gave her the residue of his effects, she paying thereout his debts and funeral and testamentary expenses; and he made her executrix: On her death without children, it was contended, on behalf of

Direction that a fund shall be disposed of "in a due course of administration."

232; *Booth v. Vicars*, 1 Coll. 6; *Bird v. Wood*, 2 Sim. & Stu. 400 (as explained in *Elmsley v. Young*, 2 M. & K. 82, 89; *Urquhart v. Urquhart*, 13 Sim. 627); *Clapton v. Bulmer*, 10 Sim. 426; 5 M. & Cr. 108; *Minter v. Wraith*, 13 Sim. 52; *Cooper v. Denison*, 13 Sim. 290; *Say v. Creed*, 5 Hare, 580; *Pinder v. Pinder*, 28 Beav. 44; *Chalmers v. North*, 28 Beav. 175; *Re Greenwood's Will*, 3 Giff. 390; *Lees v. Massey*, 3 De G. F. & J. 113; *Re Mellish*, [1916] 1 Ch. 562. See also *Tiffin v. Longman*, 15 Beav. 275. It has been doubted whether *Jones v. Colbeck*, 8 Ves. 38, which was decided on this principle, was properly within it. And the current of later authorities (*supra*, note (*h*)) seems to justify the extension of this doubt to some of the cases above cited.

(*j*) *Per* Lord Hatherley, when V.-G., in *Wharton v. Barker*, 4 K. & J. 483, 502. See also *Philps v. Evans*, 4 De G. & Sm. 188; *Vaux v. Henderson*, 1 Jac. & W. 388, n.; *Re Philps' Will*, L. R. 7 Eq. 151.

(*k*) *Re Rees*, 44 O. D. 484.

(*l*) *Re Soper*, [1912] 2 Ch. 467.

(*m*) 14 Sim. 35.

the testator's widow and next of kin, that the words "a due course of administration" meant that the fund should be distributed under the statute: But Sir L. Shadwell, V.-C., held otherwise, being of opinion that the fund belonged to the personal representative of Elizabeth B., as the residuary legatee.

6. "Family." 6. "Family." The description "family" in a bequest of personalty, although it may comprise the same persons as "kindred" or relations, or even receive a still wider interpretation (*n*), yet primarily and independently of context showing the contrary, will be read as meaning "children" (*o*), to the exclusion even of the wife (*p*). But this acceptance of the term "family" may be narrowed or enlarged by the context of the Will (*q*), so as in some instances to mean "heir" (*r*), or it may even include relations by marriage (*s*). So where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, it was held, that the testator, in the words "my family," intended to comprise his wife (*t*). So where (*u*) a testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors; and he constituted his wife and another person his executors, whom he appointed to sell and dispose of his estates and chattels, in such manner as they should jointly agree upon; or not to sell them, if it seemed most advisable to keep them, or in any way they

(*n*) *Cruwys v. Colman*, 9 Ves. 323; *Grant v. Lynam*, 4 Russ. 292. A power to an unmarried woman to appoint a fund amongst "her own family or next of kin" was held not to be confined to her statutory next of kin, but to be capable of extension to any relative: *Snow v. Teed*, L. R. 9 Eq. 622. The words "my people" have as flexible a meaning as "my family": *Re Keighley*, [1919] 2 Ch. 388.

(*o*) *Pigg v. Clarke*, 3 C. D. 672; *Re Terry's Will*, 19 Beav. 580. See also *Barnes v. Patch*, 8 Ves. 604; *Wood v. Wood*, 3 Hare, 65; *Beales v. Crisford*, 13 Sim. 592; *Gregory v. Smith*, 9 Hare, 708; *Re Parkinson's Trusts*, 1 Sim. N. S. 242; *Burt v. Hellyar*, L. R. 14 Eq. 160; *Re Hutchinson and Tenant*, 8 C. D. 540. See also Lord Alvanley's observation in *M'Leroth v. Bacon*, 5 Ves. 159, 166.

(*p*) *Re Hutchinson and Tenant*, 8 C. D. 540.

(*q*) See the observations of James, L. J., in *Lambe v. Eames*, L. R. 6 Ch. 597, 600.

(*r*) *Griffiths v. Evan*, 5 Beav. 241; *White v. Briggs*, 15 Sim. 17; 2 Phill. Ch. C. 583.

(*s*) *M'Leroth v. Bacon*, 5 Ves. 159. See *White v. Briggs*, 2 Phill. Ch. C. 583, as to the construction of the word "family" when applied to real and personal estate. See also *Williams v. Williams*, 1 Sim. N. S. 358.

(*t*) *Blackwell v. Bull*, 1 Keen, 176.

(*u*) *Woods v. Woods*, 1 Mylne & Cr. 401. See also *Re Parkinson's Trusts*, 1 Sim. N. S. 242.

should think proper, so that every creditor had his money, and if sold, "all overflush to my wife, towards her support and her family"; Lord Cottenham held, that the word "family" could not be confined to the heir, but that the other children of the testator must be considered as also objects of his bounty; And that if the contemplated event of a sale took place, a trust, as between the widow and children, would be created: And that they had such an interest in the devised estates, as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits. And in a subsequent case (*x*) the same judge held that where a testator directed that "all my property shall be at the disposal of my wife for her and her children," she was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favour of her children, subject to a life interest in herself (*y*).

In *Robinson v. Waddelow* (*z*), where a testator gave all the residue of his effects to be divided equally between his daughters, and their husbands and families; Sir L. Shadwell, V.-C., rejected the words "husbands and families," for uncertainty, and held that the two daughters took the residue equally and absolutely (*a*).

In *Doe v. Flemming* (*b*), there was a devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail, remainder to the testator's son for life, and

"Younger branches of a family."

(*x*) *Crockett v. Crockett*, 2 Phill. Ch. C. 553, overruling *S. C.*, 5 Hare, 326.

(*y*) See accord. *Hart v. Tribe*, 18 Beav. 215. And see further *Shovelton v. Shovelton*, 32 Beav. 143; *Bibby v. Thompson*, 32 Beav. 646; *Mackett v. Mackett*, L. R. 14 Eq. 49; *Curnick v. Tucker*, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414. In *Re Hutchinson and Tenant*, 8 C. D. 540, and other cases, a gift of property with an expression of confidence as to its disposal by the donee has been held to confer an absolute interest unfettered by any trust. In some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference. See per Lindley, L. J., in *Re Williams*, [1897] 2 Ch. 12. See also *Re Hamilton*, [1895] 2 Ch. 370; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Oldfield*, [1904] 1 Ch. 549; *Re Conolly*, [1910] 1 Ch. 219, ante, p. 82, n. (*o*).

(*z*) 8 Sim. 134.

(*a*) See also *Cooper v. Thornton*, 3 Bro. C. C. 186; *Robinson v. Tickell*, 8 Ves. 142. In *Re Parkinson's Trusts*, 1 Sim. N. S. 245, 246, Lord Cranworth said that the case of *Robinson v. Waddelow*, 8 Sim. 134, was not quite satisfactory to his mind. See also *Harland v. Trigg*, 1 B. C. C. 142; *Hayter v. Joinville*, 3 East, 172.

(*b*) 2 Cr. M. & R. 638.

his sons and daughters in tail; and for default of such issue, to the "younger branches of the family" of Brown Willis, and their heirs, to be equally divided amongst them, as tenants in common; and in default of such issue, to the "elder branches of the family of Brown Willis" (in the same terms): At the time of the making of the Will, and of the testator's death, there were living two daughters of Brown Willis, four daughters of one of those daughters, an only son of Brown Willis's eldest son, and an only son of his third son: At the expiration of the estate tail, limited to the testator's grandchildren, there were living many descendants of one of Brown Willis's daughters, and of his third son: And it was held by the Court of Exchequer that the devise to the branches of Brown Willis's family was void for uncertainty.

7. "Executors and administrators," or "legal representatives," or "personal representatives," or "personal representatives" or "representatives:" cases where they are to be considered as mere words of limitation:

7. "Executors and administrators," or "legal representatives," or "personal representatives." If there be a bequest of personalty to A., "his executors and administrators," the law and the testator's intention concur in transferring to A. the absolute interest in the legacy (c); and if A. dies before the testator, the legacy will lapse, and cannot be claimed by his executors or administrators (d). And so it is if the bequest be to A. and his "legal personal representative" (e), or to A. and his "legal representatives," which, in its ordinary sense, is synonymous with executors or administrators: Accordingly, in *Price v. Strange* (f), where there was a trust to sell land on the determination of a life estate, and to pay and divide the proceeds among such of the children as should then be living and *the legal representative or representatives of him, her or them, as shall then be dead*, it was held that the children took a vested interest on attaining the age of twenty-three.

So the words "personal representatives" are to be understood in the ordinary sense of executors or administrators, unless controlled by the context of the Will (g). Accordingly, in

(c) *Anderson v. Dawson*, 15 Ves. 537.

(d) See *post*, p. 960.

(e) *Taylor v. Beverley*, 1 Coll. 108, 116; *Appleton v. Rowley*, L. R. 8 Eq. 139.

(f) 6 Madd. 159.

(g) In *Stockdale v. Nicholson*, L. R. 4 Eq. 359, Malins, V.-C., elaborately discusses the whole of the cases, first dealing with those in which the words *personal representatives*, *legal representatives*, or *legal personal representatives* applied to personal estate are read as equivalent to *executors* and *administrators*. and consequently as words of limitation when they follow a limitation for life to the person to

Saberton v. Skeels (*h*), where the limitation was to the daughter for life, and then as she should appoint, and in default of appointment, to her personal representatives, it was held that the executor was entitled. Sir J. Leach there says that the ordinary sense of the words "personal representatives" is executors and administrators.

So the ordinary legal sense of the term "representatives," without the addition of "legal" or "personal," is executors or administrators (*i*). Accordingly, where a testator gave a life interest in a certain fund, with remainder "to be equally divided between all my cousins-german now existing, or their representatives," it was held, that there being nothing in the rest of the Will to control the primary legal meaning of the word *representatives*, the fund went to the executors or administrators of the testator's cousins-german as part of their personal estate (*k*).

Again, where there is a bequest to A. for life, remainder to such persons as he shall appoint by Will, and in default of appointment to his executors or administrators, he may assign the fund absolutely (*l*). So where there were bequests to

"representatives:"

bequest to A. as tenant for life, or as one of several tenants for life, remainder as he

whose representative the property is given, and as a gift to executors and administrators in that capacity when there is no such limitation. He then deals with those in which the ordinary sense of the words is controlled by a different intention appearing on the whole instrument so as to mean "next of kin." The cases where the words were held to have their ordinary meaning are set out in this note. The cases in which the words were held to mean "next of kin" will be found in note (*s*), p. 897, *post*; *Smith v. Barneby*, 2 Coll. 728; *Re Henderson*, 28 Beav. 656; *Chapman v. Chapman*, 33 Beav. 556; *Re Turner*, 2 Dr. & Sm. 501; *Hinchliffe v. Westwood*, 2 De G. & Sm. 216; *Re Wyndham's Trusts*, L. R. 1 Eq. 290; *Alger v. Parrott*, L. R. 3 Eq. 328. Cf. *Re Best's Settlement Trusts*, L. R. 18 Eq. 686.

(*h*) 1 Russ. & M. 587.

(*i*) *Re Crawford's Trusts*, 2 Drewr. 230; *Corbyn v. French*, 4 Ves. 418; *Re Turner*, 2 Dr. & Sm. 501, 508. But the context of the Will and the surrounding circumstances may show that "representatives" is not used to mean legal personal representatives, but "next of kin" or descendants. See *Re Horner*, 37 C. D. 695.

(*k*) *Re Crawford's Trusts*, 2 Drewr. 230, in which case Kindersley, V.-C., elaborately and lucidly reviewed all the authorities. See also *Chapman v. Chapman*, 33 Beav. 556; *Re Turner*, 2 Dr. & Sm. 501, 508; *Alger v. Parrott*, L. R. 3 Eq. 328; *Re Best's Settlements*, L. R. 18 Eq. 686.

(*l*) *Kirkpatrick v. Capel*, MS. Sugd. Pow. 8th edit. p. 75. See *Cherry v. Boulbee*, 2 Keen, 319. So a bequest to a wife for life, with remainder to her children, with remainder as she shall appoint, and in default thereof to her executors, administrators and assigns, gives her an absolute interest, subject to the prior limitations and the power: *Graftey v. Humpage*, 1 Beav. 52, *per* Lord Langdale. But where the trust was, to pay the income of a fund to a wife for her separate use

shall appoint, and in default of appointment, to his executors, &c. :

females, some of whom were married, and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns, it was held, that each of the legatees, whether a married or unmarried woman, was entitled, on petition, without executing any formal appointment, to an immediate transfer or payment to herself of the *corpus* of her share of the fund (*m*). So where the ultimate limitation of a fund is to the executors or administrators of one of several preceding tenants for life, it is held that the gift to the executors or administrators constitutes part of the estate of the tenant for life (*n*). Therefore, where the ultimate trust in a marriage settlement of a fund belonging to the wife is to her executors or administrators, her surviving husband will be entitled, to the exclusion of her next of kin (*o*). So where a gift, under a Will, subject to a life estate to the testator's widow, and to a life estate to his daughter and her husband and the survivor, with power of appointment to the daughter which was not executed, was in trust to pay the fund "to and for the benefit of her executors or administrators;" and the daughter died first, and then the husband, and then the testator's widow; it was held that the daughter's husband, on her death, became entitled to the reversionary interest in the fund as part of her estate (*p*).—Again, if there be a limitation of a fund to the executors of A., after the death of B. and C., it does not fail by the death of B. and C. in the lifetime of A. (*q*): And the executors of A., at his death, are entitled to the fund as part of his residuary personal estate (*r*).

limitation to the executors of A. after the death of B. :

"personal representative," or

But the ordinary sense of the words "legal representative" may be controlled by a different intention appearing upon the

for life, and that, after her death, the principal should remain on such trusts as she should appoint by Will, and in default of appointment, in trust for her next of kin according to the Statute of Distribution, it was held that she was entitled merely to the income for life, and not to the principal absolutely: *Hansen v. Miller*, 14 Sim. 22.

(*m*) *Holloway v. Clarkson*, 2 Hare, 521.

(*n*) *Daniel v. Dudley*, 1 Phill. 1; *Att.-Gen. v. Malkin*, 2 Phill. Ch. C. 64. See also *Howell v. Gayler*, 5 Beav. 157.

(*o*) *Allen v. Thorp*, 7 Beav. 72.

(*p*) *Att.-Gen. v. Malkin*, 2 Phill. Ch. C. 64. See also *Howell v. Gayler*, 5 Beav. 157.

(*q*) *Horseman v. Abbey*, 1 Jac. & W. 381.

(*r*) *Morris v. Howes*, 4 Hare, 599; *post*, p. 899. See also *Howell v. Gayler*, 5 Beav. 157.

whole instrument (s). Thus in *Baines v. Ottey* (t), where a testatrix gave real and personal estate to trustees, in trust for Mary Knightly for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of Mary Knightly, and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representatives of Mary Knightly; and Mary Knightly appointed only a part of the personal estate; Sir J. Leach, M. R., held, that the next of kin, and not the executors, were entitled to the unappointed part of the personal estate: And his Honour observed, that the words “to or amongst such person or persons as would be the personal representatives of Mary Knightly” were not applicable to executors or administrators. So in *Robinson v. Smith* (u), where a testator bequeathed 700*l.* to his daughter’s husband, his executors, &c., in trust to pay the interest to his daughter, for her separate use, for life, and after her death to such persons as she should appoint by Will, and in default of appointment, to her “personal representatives;” and the daughter died without having made any appointment; Sir L. Shadwell, V.-C., held, that her next of kin were entitled to the 700*l.* to the exclusion of her husband, because it was plain that the husband was made legatee of the fund, merely as trustee, to pay it over, if his wife died in his lifetime, and not to retain it (x). So in *Walter v. Makin* (y), a testator gave 450*l.* to trustees, their executors, &c., in trust for his son for life, and after his son’s decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the “legal representatives” of his son; and he gave the residue of his personal estate to his son, his executors, &c.: and Sir L. Shadwell held, that the words “legal representatives” meant next of kin; for it was clear on the face of the Will, that the

“legal representative,” or “executors and administrators” controlled by context, so as to mean “next of kin.”

(s) *Robinson v. Smith*, 6 Sim. 47; *Baines v. Ottey*, 1 M. & K. 465; *Walter v. Makin*, 6 Sim. 148; *Styth v. Monro*, *ibid.* 49; *King v. Cleveland*, 4 De G. & J. 477. See *Briggs v. Upton*, L. R. 7 Ch. 376, where, in a settlement, the words “to pay to legal representatives in a due course of administration” were held by Lord Hatherley, L. C., affirming the decision of Wickens, V.-C., to amount to a direction to pay to next of kin, and not to executors and administrators. Cf. *Re Gryll’s Trusts*, L. R. 6 Eq. 589. See also *ante*, p. 894, note (g).

(t) 1 M. & K. 465.

(u) 6 Sim. 47.

(x) And where there are no words of division, the nearest of kin take as joint-tenants: *Stockdale v. Nicholson*, L. R. 4 Eq. 359.

(y) 6 Sim. 148.

testator meant to use those words in a different sense from "executors and administrators," which latter words occurred several times in the Will, and especially in the gift of the residue to his son; and moreover the effect of putting that construction on the words would be to make the son partial residuary legatee so far as 450*l.* was concerned, and also general residuary legatee of the personal estate (z). And in *Styth v. Monro* (a), where a bequest was made to the "representatives" of a person already deceased, it was held by Sir L. Shadwell, V.-C., that this expression ought to be construed "descendants," the context of the Will requiring it (b).

The ordinary sense even of the express words "executors and administrators" has been held to be controllable by the plain intent collected from the whole instrument: Thus in *Bulmer v. Jay* (c), there was a trust in a marriage settlement to raise a sum of money out of the settled estate of the husband, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the "executors or administrators" of the wife: The wife died in the husband's lifetime: And it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham on appeal, that the next of kin of the wife were entitled to the money. Again, in *Smith v. Dudley* (d), in a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of *her own family*, and the ultimate trust of the husband's chattels was for his executors or administrators of *his own family*: and Sir L. Shadwell, V.-C., held that, though the same words were used, *mutatis mutandis*, in both limitations, yet the Court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and, with respect to the husband's chattels, his executors or administrators simply. But in *Daniel v. Dudley* (e), where by a marriage settlement a sum of money, the property of his wife, was vested in trustees for the separate use of the wife during her

(z) See also *Cotton v. Cotton*, 2 Beav. 67, *post*, p. 902; *Nicholson v. Wilson*, 14 Sim. 549; *Smith v. Palmer*, 7 Hare, 225; *Walker v. Lord Camden*, 16 Sim. 329. So a gift to "legal personal representatives, share and share alike," was held to mean next of kin: *King v. Cleveland*, 26 Beav. 26, 166; 4 De G. & J. 477.

(a) 6 Sim. 49.

(b) See also, *accord.*, *Atherton v. Crowther*, 19 Beav. 448.

(c) 4 Sim. 48; 3 M. & K. 197.

(d) 9 Sim. 125.

(e) 1 Phillim. 1.

life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon certain trusts for the children, and in default of children, who, being sons, should attain twenty-one, or being daughters, should attain twenty-one or marry, in trust for such person or persons as the wife should, notwithstanding her coverture by deed or Will appoint, and in default of appointment, in trust to pay and transfer the same to the executors or administrators of the wife: Lord Cottenham expressed a strong opinion (contrary to the decision of Sir L. Shadwell in the same case (*f*)) that under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administrator of the wife as part of her general personal estate. "Legal or personal representatives," said his Lordship, "may mean next of kin, but executors or administrators cannot. Therefore, none of the cases in which next of kin have been held to take *ex vi termini*, by the description of legal or personal representatives, have any application to the present. The limitation in this case being to the executors or administrators, it seems to me that it cannot signify whether these words are construed as words of limitation or words of purchase; because, on either supposition, the persons answering that description take in their representative character, and then the fund is to be applied and administered in the same manner as any other assets that come to them in that character. That is the doctrine of all the cases that have been cited, except that of *Bulmer v. Jay* which stands alone." This opinion of Lord Cottenham was recognised by Lord Langdale as a governing authority in *Allen v. Thorp* (*g*). In the subsequent case of *The Attorney-General v. Malkin* (*h*) Lord Cottenham said, that cases *might* exist, where the next of kin would be entitled under a gift to executors and administrators upon evidence of an intention derived from peculiar terms and provisions of the instrument controlling the ordinary and legal sense of the word used; but that such evidence ought to be very strong to justify such a construction (*i*).

(*f*) 11 Sim. 163.

(*g*) 7 Beav. 72; *ante*, p. 896, n. (*o*). See also *Morris v. Howes*, 4 Hare, 605, *per* Wigram, V.-C., and *Att.-Gen. v. Malkin*, 2 Phillim. 64; *ante*, p. 896, n. (*n*). See also *Page v. Soper*, 11 Hare, 321. in which case Wood, V.-C., thought himself justified in disregarding *Bulmer v. Jay*. See also *Seymour's Trust*, Johns. 472.

(*h*) 2 Phil. Ch. C. 64, 68; *ante*, p. 896.

(*i*) In *Graffey v. Humpage*, 1 Beav. 52, Lord Langdale said, that

Bequest by A. to the executors or "representatives" of B., or by a testator to his own "executors," &c., or "representatives:"

A question, somewhat different from that involved in the cases just mentioned, arises on occasions where a bequest is made by A. to the executors, or to the "representatives" of B., or where the testator bequeaths a fund to his own executors or administrators, or to his own "representatives."—In cases of such limitations to executors or administrators, the fund will pass to them, not for their own benefit, but for the purposes, whatever they may be, for which they hold the general personal estate of the testator (*k*). And the same construction seems *primâ facie* to be applicable, if the limitation be to the testator's "representative or representatives," or "legal representatives" (*l*). But the context of a Will containing these words may be such as to render it necessary or proper to read them as importing consanguinity, or as referring to a distribution, though there is no intestacy, such as would have taken place had there been an intestacy (*m*).

In *Jennings v. Gallimore* (*n*), the sum of 1,000*l.* was settled in trust to be paid according to the appointment of Ambrose Gallimore, and in default thereof to his legal representatives, according to the course of administration: By his Will, reciting the settlement, and his power of appointment, he appointed the money to be paid to his "legal representatives according to the course of administration." And he gave the residue of his property, real and personal, to his nephew, *whom he appointed his residuary legatee and one of his two executors*: The question as to this 1,000*l.* was between the assignees of the nephew, a bankrupt, and the other next of kin, a sister and nieces: And Lord Alvanley held, that the next of kin were entitled to share with the assignees of the nephew: His Lordship observed, that if it had rested on the settlement itself, he should have had great doubt of being able to get over the words "legal repre-

though cases had occurred in which, to support the plain intent, the words "personal representatives," or "executors and administrators," had been construed to mean next of kin, yet the words "executors, administrators, and assigns," did not appear to him to admit of this interpretation. See also *Webb v. Sadler*, L. R. 8 Ch. 419, *post*, p. 903, n. (*f*).

(*k*) *Mackenzie v. Mackenzie*, 3 Mac. & G. 599; *Morris v. Howes*, 4 Hare, 599; *Long v. Watkinson*, 17 Beav. 471; *Trethewy v. Helyar*, 4 C. D. 53. Cf. *Lord Advocate v. Bogie*, [1894] A. C. 83; *Re Bosanquet*, 85 L. J. Ch. 14.

(*l*) *Smith v. Barneby*, 2 Coll. 728, 736; affirmed by Lord Chancellor, July, 1847; *Re Crawford's Trusts*, 2 Drewr. 230; *ante*, p. 895.

(*m*) See *Minter v. Wraith*, 13 Sim. 52.

(*n*) 3 Ves. 146.

sentatives;" but that he could not read the Will without implying an intention to consider it otherwise: That the testator never would have made such a Will, if he had thought that all the words he used came to nothing more than executing the power by giving the fund to his nephew: If he meant to give to him, to whom he had given all the rest, why did he not say so? Again, in *Long v. Blackall* (o), the testator bequeathed leasehold property held for a term of years to his widow, during her widowhood, remainder to his two living sons, and a child *en ventre*, if it proved a son, in succession, for life, remainder to their successive issue male; and if all his sons died without leaving issue male, remainder to such persons as should then be the "legal representatives" of him the testator; and he appointed his wife executrix: The sons all died without issue: And Lord Loughborough held, that the next of kin at the time of distribution were entitled to the property. The words in this case, as Lord Alvanley observed on another occasion (p), put it out of the power of the Court to put any other interpretation on the Will: for the word "then" plainly proved that the personal representatives at the time of the death were not intended: and even if that word had not occurred, there was a great deal to show that such could not be the intention; for the wife was made executrix, and it would have been a strange circuitous way of giving it to her.

It was observed by Sir John Leach, M.R., in *Price v. Strange* (q), that he did not collect that Lord Alvanley, in *Bridge v. Abbott* (r), adverted to the case of a widow, and would have included her in his sense of legal representatives: Nor did the circumstances of the case of *Palin v. Hills* (s) require any decision with respect to this point. In *Horsepool v. Watson* (t), a testatrix devised lands to James Horsepool and Mary his wife for their lives, and the life of the survivor; and after the decease of the survivor, to trustees, to sell and apply the proceeds "unto and amongst all and every the issue child or children male or female of the body of the said James Horsepool by the said Mary his wife, and *their representatives* equally, share and share alike." One of the children of James and Mary Horsepool survived the testatrix and Mary Horsepool, but died in the lifetime of James Horsepool, having

Whether the expression "legal representatives," when it does not mean executors, means "nearest of kin," or next of kin according to the Statute of Distributions.

(o) 3 Ves. 486. (p) *Holloway v. Holloway*, 5 Ves. 401, 402.

(q) 6 Madd. 162, *ante*, p. 894.

(r) 3 Bro. C. C. 224.

(s) 1 M. & K. 470.

(t) 3 Ves. 383.

married and left children, and her husband, who became her administrator: The question was, whether the children were entitled to her share, as her "representatives," or whether their father could claim, as her administrator: And Lord Loughborough decided in favour of the children; his Lordship being of opinion, that the use of the word "issue" qualified the word "representatives," and explained what the testatrix meant by the general word; children and their representatives being issue (*u*). In *Cotton v. Cotton* (*x*) there was a bequest to A. or his legal representatives: A. was dead at the date of the testator's Will, having bequeathed his property on particular trusts: Several points were argued: first, whether the fund was subject to the trusts of A.'s Will; secondly, whether his executors took beneficially as his "legal representatives"; and thirdly, whether the fund was divisible among the nearest of kin of A. (thus excluding the widow), or amongst his next of kin according to the Statute of Distributions: Lord Langdale, M. R., held that A.'s next of kin according to the statute were entitled; being of opinion that the words "legal representatives" meant those persons who would be entitled beneficially under the statute; for that when it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who, upon the construction of the Will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. So in *Booth v. Vicars* (*y*), a testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., equally to be divided between them, share and share alike, if then living; but if dead, to go and be divided to and amongst the next legal representatives of A. and B., share and share alike: A. and B. died in the lifetime of the testator's widow; And it was held by Knight-Bruce, V.-C., that the next of kin to A. and B. according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund; and further, that they were to take *per stirpes*, and not *per capita* (*z*).

(*u*) See also *Styth v. Monro*, 6 Sim. 49.

(*x*) 2 Beav. 67.

(*y*) 1 Coll. 6.

(*z*) See also *Martin v. Glover*, 1 Coll. 269; *Dilner v. Leech*, 10 Beav.

Cases of some difficulty connected with this subject occur as to the construction of Wills, in which the words "executors or administrators" or "representatives" clearly mean *substitutes* in the event of a legatee dying in the lifetime of the testator; and the question is, who are the substitutes intended? The first inquiry which suggests itself on this head is, whether, if the legatee dies before the testator, and the bequest consequently passes, under the Will, to the executors and administrators of the legatee, they shall hold the property bequeathed for their own personal benefit, or as trustees. On the latter supposition a second inquiry becomes necessary: viz., for whose benefit they shall be considered to hold it.

In the case of *Ripley v. Waterworth* (a), Lord Eldon observed, that he doubted whether an executor or administrator ever takes anything as such, which he will not be bound to apply as personal estate of the testator or intestate: And in *Milner v. Harewood* (b), his Lordship, recurring to his decision in *Ripley v. Waterworth*, said, "I have determined, and I see no reason to dissent from it, that where the executor is the special occupant of an estate *pur autre vie*, taken as executor, he must hold that as all other property taken by an executor, and therefore distributable in this Court."

The case of *Evans v. Charles* (c), which was an express decision, that where executors or administrators are entitled under a bequest to "the personal representatives" of a third person, they take the property as *personæ designatæ*, beneficially, and not as part of the estate of the deceased, must be regarded as no longer law. Lord Abinger, C. B., said that this case was clearly not law (d). And it appears to have been regarded as overruled by Sir John Leach and Lord Brougham in the case of *Palin v. Hills* (e), and by Romilly, M. R., in *Long v. Watkinson* (f).

Bequests to "executors or administrators," or "representatives" as substitutes for a legatee dying before the testator:

whether in such case, or in any case, an executor or administrator can take, as such, beneficially:

362; *Fielden v. Ashworth*, L. R. 20 Eq. 410; *Re Gryll's Trusts*, L. R. 6 Eq. 589; *Re Richards*, [1910] 2 Ch. 74.

(a) 7 Ves. 438.

(b) 18 Ves. 273.

(c) 1 Anstr. 128.

(d) *Marshall v. Collett*, 1 Younge & Coll. 239.

(e) 1 M. & K. 470. See also *Daniel v. Dudley*, *ante*, p. 898; *Att.-Gen. v. Malkin*, 2 Phil. Ch. C. 64, *ante*, p. 896, n. (p); *Morris v. Howes*, 4 Hare, 599, *ante*, p. 893.

(f) 17 Beav. 473. See also *Re Henderson*, 28 Beav. 656; *Webb v. Sadler*, L. R. 8 Ch. 419, where James, L. J., says: "For some time there was an opinion entertained by the Courts that the words 'executors and administrators' following a gift for life were to be

It must, however, be observed, that unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall, at a particular time named by him, sustain a particular character, and therefore that the expressions of the Will may be such, as clearly to entitle the executors or administrators to a beneficial interest, even although the limitation to them should be preceded by a life estate in their testator or intestate (*g*).

However, in *Marshall v. Collett* (*h*), where the trust was for the executors or administrators to and for their own use and benefit, and in *Stocks v. Dodsley* (*i*), where the trust was for the executors and administrators *absolutely*, it was held that the executor did not take a beneficial interest. And in *Hames v. Hames* (*k*), it was held by Lord Langdale, M. R., upon the construction of a marriage settlement, that under a limitation to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit, his executors were not entitled beneficially (*l*).

In such cases the general rule appears to be, that the fund is to be applied and administered in the same manner as any other assets that come to them in their official character (*m*).

for whose benefit the trust shall enure when an executor or administrator takes a bequest made to him as a purchaser, and not beneficially.

1. "Servants:" what sort of servants entitled:

(C.) Who are entitled under the description of—1. "Servants"—2. "Inhabitants"—3. "Government."

1. "Servants." Where the testator, after giving legacies to two of his servants, if in his service at his death, bequeathed to his "other servants" who should be living with him at that time 50*l.* a-piece, and 10*l.* each for mourning; and by a codicil revoked the two latter legacies, and gave to all his other servants, in lieu thereof, 500*l.* each, and 20*l.* each for mourning;

considered next of kin, or that the executors were to take beneficially as '*personæ designatæ*.' This was acted on in *Palin v. Hills*, 1 M. & K. 470, before Lord Brougham when he reversed a decision of the Master of the Rolls; but for many years there has been no question that 'executors and administrators' mean executors and administrators and nothing else."

(*g*) *Holloway v. Holloway*, 5 Ves. 401; *Sanders v. Franks*, 2 Madd. 147; *Wallis v. Taylor*, 8 Sim. 241.

(*h*) 1 Younge & Coll. 232.

(*i*) 1 Keen, 325.

(*k*) 2 Keen, 646.

(*l*) See also *Wood v. Cox*, 2 M. & Cr. 684; *Stubbs v. Sargon*, 3 Mylne & Cr. 507; *Meryon v. Collett*, 8 Beav. 386.

(*m*) *Ante*, p. 900.

Sir W. Grant held, that a coachman, who was provided for the testator by a job-master, together with a carriage and horses, in the usual course of business, was not a servant within the intent and meaning of the Will (*n*). In another case (*o*) the testator bequeathed a year's wages to "such of his servants as should be living with him at his death"; And the Court declared that stewards of Courts, and such other servants as were not obliged to pass their whole time in their master's service, were not servants within the meaning of the bequest (*p*). So in *Booth v. Dean* (*q*), a testator bequeathed to each of his servants one year's wages, over and above what might be due to them at the time of his decease: Upon this bequest a question was raised, whether a person who had worked in the testator's garden, under his gardener, for several years, at weekly wages, and a boy who had served the testator for some time as a cow-boy, at weekly wages, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the Will to the year's wages: And Sir J. Leach, M. R., was of opinion that these persons were not servants in the sense in which the testator had used the expression: That in speaking of a year's wages, the testator plainly used that expression with reference to family servants usually hired by the year (*r*). In *Howard v. Wilson* (*s*) (which was a suit of subtraction of legacy, before Sir John Nicholl), a coachman, a married man, originally hired by and who had lived five years

(*n*) *Chilcote v. Bromley*, 12 Ves. 144.

(*o*) *Townshend v. Windham*, 2 Vern. 546.

(*p*) The Court remarked at the same time, that it would not narrow the bequest to such servants only who lived at the testator's house, or had diet from him.

(*q*) 1 M. & K. 560; followed in *Re Forrest*, [1916] 2 Ch. 386; cf. *Re Sheffield*, [1911] 2 Ch. 267.

(*r*) Accordingly, it was held by Turner, V.-C., that a gardener employed at weekly wages was not included in a bequest of a year's wages to each of the servants of the testator living with him at his decease; for that a legacy of a year's wages cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks: *Blackwell v. Pennant*, 9 Hare, 511; *Re Ravensworth*, [1905] 2 Ch. 1; *Re Sheffield*, *sup.* But outdoor servants continuously employed at weekly wages are entitled under a bequest to "servants in my service at the time of my decease": *Thrupp v. Collett*, 26 Beav. 147. And one who acted as the land agent and house steward of the testator, but resided out of the house, was held entitled under a bequest to "all my servants and day labourers who shall be in my service at the time of my death, one year's full wages": *Armstrong v. Clavering*, 27 Beav. 226. But "servants" does not include farm servants: *Re Forrest*, [1916] 2 Ch. 386.

(*s*) 4 Hag. 107.

with the testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, and remaining with her, though she changed her job-man, was held (although the several job-masters paid him his wages and board wages, except three shillings per week extra in the country, and found him his liveries) entitled under a bequest "to each of my servants living with me at the time of my death, 10*l*." But in *Ogle v. Morgan (t)*, Lord Truro held that a head gardener, who lived in one of the testator's cottages and was not dieted by him, was not entitled under a bequest of a year's wages to "each person as a servant in my domestic establishment at the time of my decease." A companion housekeeper and a certified male nurse have been held to be domestic servants, the term "domestic" being equivalent to "household" (*u*). Persons employed by the committee of a lunatic testator are not persons in the testator's service (*v*).

whether a
continuance
in the service
is necessary
to entitle.

Generally speaking, a servant must continue in the service of the testator till the time of his death, to come within the description of "servants." But in *Herbert v. Reid (w)*, where a servant quitted the testator's house a few days before the death of the testator, she was allowed to show, by proof of his declarations, that she was still considered by him to be in his service. And where a testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, and then added "to the other servants 500*l*. each," it was held, that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of 500*l*. (*x*). A suspension of service with the consent of the master does not disentitle the servant (*y*).

2. "Inhabitants:"

2. "Inhabitants." Where a testator gave a legacy "to the poor inhabitants of St. Leonard's, Shoreditch, for ever," Sir Thomas Clarke, M. R., gave his opinion in favour of the

(*t*) 1 De G. M. & G. 359.

(*u*) *Re Lawson*, [1914] 1 Ch. 68.

(*v*) *Re King*, [1917] 2 Ch. 420.

(*w*) 16 Ves. 481.

(*x*) *Parker v. Marchant*, 1 Y & Coll. Ch. C. 290. But where an annuity was given to a servant, provided she should be in the testator's service at the time of his decease, and two days before his death, she was wrongfully dismissed, it was held that she was not entitled: *Darlow v. Edwards*, 1 H. & C. 547.

(*y*) *Re Lawson*, [1914] 1 Ch. 68; *Re Cole*, 88 L. J. Ch. 82.

charity, and said the Court had done so in many cases where the expressions were much more general and uncertain. But as it could not be intended that the poor inhabitants which were relieved by the parish should have benefit by this legacy (which in effect would be giving to the rich and not to the poor), his Honour declared that the distribution of the legacy was to be confined to the poor inhabitants of the parish, not receiving alms of the said parish; and ordered a scheme to be laid before the Master for such distribution (*yy*). In another case (*z*), a testatrix bequeathed all which might remain of her money, after her debts and legacies were paid, "to the Inhabitants of Tawleaven Row, in the parish of Lethney:" The Master found that Tawleaven Row consisted of seven houses, which were entirely occupied by poor fishermen and labourers and their families, and that the inhabitants at the time of the death of the testatrix were the persons in his report enumerated, being thirty in number, of whom three were since dead, leaving no personal representatives: and Lord Langdale, M. R., held that the persons so found by the Master to be the inhabitants were entitled to the residue of the testatrix's general personal estate, after payment of her debts and legacies.

3. "Government." A legacy to government for the benefit of the public is to be disposed of under the king's appointment by sign manual: The Crown is to direct its application to a proper use: Accordingly, in *Newland v. Attorney-General* (*a*), Abraham Newland bequeathed stock "to his Majesty's Government in exoneration of the national debt:" and Lord Eldon directed the fund to be transferred to such person as the king should appoint under sign manual.

(D.) *Mistakes in the Names or Descriptions of Legatees.*

The general rule upon this subject is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified, and the true intention of the testator ascer-

(*yy*) *Att.-Gen. v. Clarke*, Ambl. 422.

(*z*) *Rogers v. Thomas*, 2 Keen, 8.

(*a*) 3 Meriv. 684.

tained in two ways: 1. By the context of the Will; 2. To a certain extent, by parol evidence.

Mistake
rectified by
the context.

Cases where
the descrip-
tion pre-
vailed.

Cases where
the name
prevailed.

1. The mistake may be rectified by the context. Thus, an error in the *name*, and even of the *name and sex* (*b*), of the legatee may be obviated by the accuracy of his *description* (*c*): as where a legacy is given to "my namesake *Thomas*, the *second* son of my brother," and the testator's brother has no son named *Thomas*, but his second son is named *William*, there is sufficient certainty in the description to entitle the second son (*d*). So an error in the *description* may be obviated by the certainty of the *name*; as where a legacy was given to "Charles Millar Standen and Caroline Eliz. Standen, *legitimate* son and daughter of Charles Standen, now residing with a company of players," and it appeared that they were *illegitimate* children, their claim was nevertheless supported (*e*). So where there was a bequest to *John Newbolt*, *second* son of *William Strangways Newbolt*, vicar of Somerton; and the vicar of Somerton was *William Robert Newbolt*, and his *second* son was *Henry Robert*, and his *third* son was *John Pryce*; it was held, that *John Pryce Newbolt* was entitled to the legacy; for that the maxim applied, "*Veritas nominis tollit errorem descriptionis*" (*f*). So where the testator, being resident in India, bequeathed his residuary property to his "nearest relations in my native country Ireland," sisters living elsewhere were held entitled (*g*).

(*b*) *Ryall v. Hannam*, 10 Beav. 536; *Re Ricket*, 11 Hare, 299; *S. C.*, sub nom. *Re Ricket's Trust*, 22 L. J. Ch. 1044.

(*c*) *Camoys v. Blundell*, 1 H. L. C. 778; *Blundell v. Gladstone*, 1 Phil. C. C. 279, 288; *Feltham's Trust*, 1 Kay & J. 528; *Adams v. Jones*, 9 Hare, 485; *Hodgson v. Clarke*, 1 De G. F. & J. 394; *Re Nunn's Trusts*, L. R. 19 Eq. 331; *Charter v. Charter*, L. R. 7 H. L. 364. For cases of a misnomer of corporations, see *Att.-Gen. v. Sibthorpe*, 2 R. & My. 107; *Queen's College v. Sutton*, 12 Sim. 521.

(*d*) *Stockdale v. Bushby*, 19 Ves. 381. See also *Bristow v. Bristow*, 5 Beav. 289; *Douglas v. Fellows*, Kay, 114.

(*e*) *Standen v. Standen*, 2 Ves. 589; *Re Blackman*, 16 Beav. 377; *Mostyn v. Mostyn*, 17 Beav. 323; 3 De G. M. & G. 140; 5 H. L. C. 115; *Bernasconi v. Atkinson*, 10 Hare, 345; *Garner v. Garner*, 29 Beav. 114; *Gillett v. Gane*, L. R. 10 Eq. 29; *Farrer v. St. Catherine's Coll.*, L. R. 16 Eq. 19; *Garland v. Beverley*, 9 C. D. 213; *Anderson v. Berkley*, [1902] 1 Ch. 936.

(*f*) *Newbolt v. Price*, 14 Sim. 354. The rule "*Falsa demonstratio non nocet*" means that if there be an adequate and convenient description with convenient certainty of what was meant to pass, or who was meant to be legatee, a subsequent erroneous addition will not vitiate it: *Webber v. Stanley*, 16 C. B. N. S. 755. Cf. *Jarman on Wills*, 5th edit. p. 742, quoted with approval by *Lindley, M. R.*, in *Cowan v. Truefitt*, [1899] 2 Ch. 309, 311.

(*g*) *Smith v. Campbell*, 19 Ves. 400.

Again, a mistaken omission of the name of the legatee may be supplied by the context: as when the testator gives his residuary estate to be divided among his *seven* children, and in enumerating them mentions *six* names only: or where he makes a bequest to his six grandchildren by their Christian names, and mentions one twice over, omitting another altogether (*h*).

2. The mistake may, to a certain extent, be rectified by parol evidence. It is obvious that the nature of this Treatise will not allow of a full consideration of this wide and difficult subject: It may be sufficient in this place to mention the general principles established with respect to it. Mistake rectified by parol evidence.

There is no rigid rule which forbids inquiry as to who is the person to take the benefit even where a legatee is accurately named in the Will (*i*); and it may, perhaps, be safely stated as a general proposition, that a Court may inquire into every material fact relating to the person who claims to be interested under the Will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator (*j*).

In all cases in which a difficulty arises in applying the words of a Will to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain who was the person really intended to take under the Will; according to the maxim, "*Ambiguitas verborum latens, verificatione suppletur.*"

There is, however, but one class of cases in which evidence of the testator's *declarations* can properly be admitted; and that is, of cases of *equivocation*, viz., where an ambiguity arises, from the admission of extrinsic evidence, as to which of two or

(*h*) *Garth v. Meyrick*, 1 Bro. C. C. 30; *Eddels v. Johnson*, 1 Giff. 22. See *post*, p. 913.

(*i*) *National Soc. v. Scottish National Soc.*, [1915] A. C. 207.

(*j*) This subject is discussed with much learning and ability by Vice-Chancellor Wigram, in his treatise on "The application of Extrinsic Evidence to Interpretation of Wills." See also *Feltham's Trust*, 1 Kay & J. 528; *Bernasconi v. Atkinson*, 10 Hare, 345; *Drake v. Drake*, 8 H. L. C. 172; *Charter v. Charter*, L. R. 7 H. L. 364; *Re Wolverton Estates*, 7 C. D. 197; *In the goods of Blake*, 6 P. D. 217; *Re Taylor*, 34 C. D. 255; *Re Ray*, [1916] 1 Ch. 461. See also *Re Grainger*, [1900] 2 Ch. 756; [1902] A. C. 1, where the admissibility of extrinsic evidence in aid of the interpretation of Wills was discussed.

more things, or which of two or more persons, *each answering the description in the Will*, the testator meant to designate (*k*).

Accordingly, where a complete blank is left for the devisee's name in a Will, no parol evidence, however strong, will be allowed to fill it up as intended by the testator (*l*). Where, however, a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended (*m*). So in a case of a devise "to Mrs. C.," Lord Loughborough referred it to the Master to receive evidence, to show the person intended (*n*). The two last cases, perhaps, are only reconcile-

(*k*) *Miller v. Travers*, 8 Bing. 244; *Doe v. Hiscocks*, 5 M. & W. 363; *Doe v. Westlake*, 4 B. & Ald. 57; *Stringer v. Gardiner*, 27 Beav. 35; *Fleming v. Fleming*, 1 H. & C. 242; *Re Ingle's Trusts*, L. R. 11 Eq. 578; *Farrer v. St. Catherine's Coll., Cambridge*, L. R. 16 Eq. 19. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed that he had benefited, can only be received where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the Will is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses, and whether there exists any person or thing to which the whole description given in the Will can be with sufficient certainty applied: *Charter v. Charter*, L. R. 7 H. L. 364. Where a legatee is once correctly described in a Will and the same name is mentioned again without any description, evidence is *not* admissible to show that a different person was intended: *Webber v. Corbett*, L. R. 16 Eq. 515.

(*l*) *Baylis v. Att.-Gen.*, 2 Atk. 239; *Hunt v. Hort*, 3 Bro. C. C. 311; *Miller v. Travers*, 8 Bing. 254; *Clayton v. Lord Nugent*, 13 M. & W. 200. But where such complete blank appears in the probate copy of a Will the Court is entitled to look at the original Will for the purpose of construing it: *per* Lord Esher, M. R., and Baggallay, L. J., in *Re Harrison*, 30 C. D. 390, *ante*, p. 455.

(*m*) *Price v. Page*, 4 Ves. 680. See also *Phillips v. Barker*, 1 Sm. & G. 583; *Sullivan v. Sullivan*, Ir. Rep. 4 Eq. 457; *In the goods of Hubbuck*, [1905] P. 129.

(*n*) *Abbot v. Massie*, 3 Ves. 148. And where the testator appointed "Percival —, of Brighton, the father," his executor, evidence was admitted of the circumstances under which the deceased made his Will and of the persons about him in order to satisfy the Court who was meant by the imperfect description of the executor: *In the goods of De Rosaz*, 2 P. D. 66. Evidence in this case was tendered of the draft of the Will in the testator's own handwriting in which the blank was filled in, and the name of Percival Boxall written in full. Sir J. Hanen decided the case irrespective of the testator's expressed intention, and did not consider it necessary to express a positive opinion on the admissibility of the evidence. In the course of his judgment, however, he said: "I have dealt with the case thus far on the supposition that evidence of the testator's declarations of intention are not admissible. In the case of *Charter v. Charter* (*ubi supra*), Lord Cairns says: 'The only case in which evidence of this kind can be received is where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or two things.'"

able with the principles of law applicable to this subject, on the supposition that the evidence went to establish in the one case, that the claimant of the legacy was a person whom the testator was in the habit of calling "Mrs. C.,"—and in the other, that the claimant was a person whom the testator was in the habit of calling by the surname only, (o). Where a testator has habitually called certain persons or things by peculiar names, and those names occur in his Will, evidence of such habit seems receivable to explain the meaning of the Will, in like manner as if his Will had been written in cypher, or in a foreign language (p).

With respect to legacies given to persons in particular characters, in some cases such legacies will fall within the rule above stated, that where there is no doubt as to the person intended, the mis-description of character shall not frustrate the bequest. Thus a woman may take a legacy by the name of the wife of such a one, although she be not a lawful wife, if she be reputed or known by that name (q). But it is otherwise where a bequest is made to a person in a certain character, which may reasonably be presumed to be the motive of the testator's bounty,

Legacy to one in a particular character.

Sir J. Hannen's own reasoning seems to show that the rule in *Charter v. Charter* requires no qualification, but of course the nearer the imperfect description approaches a sufficient definition of the testator's intention, the stronger the inclination to break the rule and to admit evidence of the testator's declaration to complete the imperfect description. It will be found that in most of the cases in which evidence of declarations of the testator was admitted, the description in the Will was really applicable to each of several subjects when the words not applicable to any person at all are omitted from consideration. See *Careless v. Careless*, 1 Mer. 384; *Still v. Hoste*, 6 Madd. 192. The case of *Price v. Page*, *ubi supra*, would seem to be explicable as a case of "equivocation" without reference to the ground mentioned in the text. The case of *Abbot v. Massie*, *ubi supra*, would seem explicable (if at all) only on the ground that the evidence intended to be taken had no reference to the declarations of intention by the testator. In *Re Ofner*, [1909] 1 Ch. 60, the testator's instructions for his Will were admitted as evidence to show who the legatee was whom the testator had wrongfully described by the name of "Robert." This was followed in *Re Halston*, [1912] 1 Ch. 435.

(o) See the observations of Rolfe, B., in *Clayton v. Lord Nugent*, 13 M. & W. 207. See also *Lee v. Pain*, 4 Hare, 251.

(p) *Doe v. Hiscocks*, 5 M. & W. 363, 368. As to special names used by a testator to describe things, and evidence of his practice in his lifetime, see *post*, Ch. II. § IV.

(q) *Giles v. Giles*, 1 Keen, 685; *Doe v. Rouse*, 5 O. B. 422; *Re Petts*, 27 Beav. 576; *Re Wagstaff*, [1908] 1 Ch. 162. But not, it should seem, if there is no evidence that she was known to the testator in such a way as to lead to the inference that she was intended by the description of wife: *Davenport's Trust*, 1 Sm. & G. 126.

and that character is subsequently ascertained to have been falsely assumed by the legatee, by a fraud practised on the testator (*r*). Thus, if a woman bequeaths a legacy to her supposed husband, who is in fact the husband of another woman, he shall take nothing by the bequest (*s*).

In *Rishton v. Cobb* (*t*) a testator gave a fund to trustees, on trust to empower Lady C., "*widow of Sir N. C.*," to receive the dividends so long as she should continue single and unmarried: At the date of the Will, and at the testator's death, Lady C. was married to one R.; but he had deserted her; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.; and the testator and others always considered her so to be: Sir L. Shadwell, V.-C., held that she, and her husband in her right, were entitled to claim the benefit of the bequest; for that no case of fraudulent misrepresentation had been established against her. And this decision was affirmed by Lord Cottenham on appeal (*u*).

In *Schloss v. Stiebel* (*x*) a testator, domiciled in Jamaica, *became, during a temporary residence at Frankfort, engaged

(*r*) The distinction between a fraudulent and an innocent legatee is well illustrated by the case of *Wilkinson v. Joughin*, L. R. 2 Eq. 319, where the income of property was given by a testator to a woman in the character of, and whom he described as, his wife but who at the time of the marriage ceremony with him and at his death had a husband living, and he bequeathed the residue of his property to his "step-daughter," the daughter of his supposed wife; and it was held that the bequest to the mother was void by reason of the fraud committed by her, but that the bequest to her daughter was valid: but see *Re Wagstaff*, [1908] 1 Ch. 162; *Re Hammond*, [1911] 2 Ch. 342. As to the gift to the daughter, compare *Davenport's Trust*, 1 Sm. & G. 126. But in *Re Petts*, 27 Beav. 576, the Court in the case of a married woman who had gone through the form of marriage a second time in the belief that her husband was dead, supported the bequest to her on the ground that the evidence showed no fraud on her part. See also *Anderson v. Berkley*, [1902] 1 Ch. 936.

(*s*) *Kennell v. Abbott*, 4 Ves. 802; *Wilkinson v. Joughin*, L. R. 2 Eq. 319. See also *Ex parte Wallop*, 4 Bro. C. C. 90, mentioned by Lord Alvanley in *Kennell v. Abbott*. That learned judge, in the latter case, observed that he would not have it understood, that if a testator, in consequence of the supposed affectionate conduct of his wife, gives her, being deceived by her, a legacy as his *chaste* wife, evidence of violation of her marriage vow could be given for the purpose of defeating the bequest; since that would open too wide a field; 4 Ves. 809. Cf. *ante*, p. 123, as to revocation by a subsequent Will or codicil made under the impulse of a mistaken notion of facts.

(*t*) 9 Sim. 615. The authority of this case was doubted by Lord Selborne in *Re Boddington*, 25 C. D. 685, 686, 689, and distinguished in *Re Mason*, [1910] 1 Ch. 695; and *McCalmont v. Barklie*, [1917] 1 Ir. R. 1.

(*u*) 5 M. & Cr. 145.

(*x*) 6 Sim. 1.

and betrothed to marry A. S.; and by a codicil to his Will, after mentioning her by name, and alluding to his intended marriage with her, he gave 3,000*l.* “to my wife.” During the engagement, but before the marriage, the testator died: And Sir L. Shadwell, V.-C., held that A. S. was entitled to the legacy: his Honour being of opinion that it was not given on condition of the testator marrying her, but that he had described her with reference to his intention of doing so.

Where there is a bequest to a class, and the intention of the testator is apparent to include all who constitute the class, though by mistake he has specified a wrong number, the Court will not allow such an error to have an excluding operation, but will strike out the specified number (*y*). Thus, in *Garvey v. Hibbert* (*a*), the testator gave “to the *three* children of A. the sum of 600*l.* a-piece;” and Sir W. Grant held, that four children, all born before the date of the Will, were entitled to 600*l.* each (*b*). Again, in *Harrison v. Harrison* (*c*), the testator bequeathed to the *two sons and the daughter* of Thomas Lovell 50*l.* each. At the date of the Will and of the death of the testator, Thomas Lovell had *five* children living, namely, *one son and four daughters*, and not two sons and one daughter: And Sir John Leach, M. R., held that each of the five children was entitled to a legacy of 50*l.* Again, where a testator bequeathed 4,000*l.* to trustees for the benefit of “the two children of W. by his late wife,” and there were four children of W. by his late wife living at the date of the bequest, it was held that the four children were entitled to the 4,000*l.* in equal shares (*d*). But in *Lord Selsey v. Lord Lake* (*e*), the testator gave a rent-charge to trustees, during the life of his niece and her *five daughters* in trust, to pay it to his niece for life, and after her death, upon the like trust for her *said* daughters and the survivors and survivor, and while more than one should

Mistakes in the description of the number of a class of legatees.

(*y*) *Newman v. Piercey*, 4 O. D. 41; *Re Sharp*, [1908] 2 Ch. 190. And see *per Lindley, L. J.*, in *Re Stephenson*, [1897] 1 Ch. 75, 83; and *Re Groom*, [1897] 2 Ch. 407.

(*a*) 19 Ves. 124; *Re Sharp, supra*.

(*b*) See also *Lee v. Pain*, 4 Hare, 249; *Morrison v. Martin*, 5 Hare, 507; *Daniell v. Daniell*, 3 De G. & Sm. 337; *Yeats v. Yeats*, 16 Beav. 170; *Spencer v. Ward*, L. R. 9 Eq. 507; *Re Bassett's Estate*, L. R. 14 Eq. 54; *M'Kechnie v. Vaughan*, L. R. 15 Eq. 289.

(*c*) 1 Russ. & M. 72.

(*d*) *Re Groom*, [1897] 2 Ch. 407.

(*e*) 1 Beav. 146.

be living, to be divided between them in equal shares: It appeared, that at the date of the Will, and at the death of the testator, his niece had *five sons and only one daughter*: And Lord Langdale, M. R., held, that the daughter alone was entitled to the annuity for life on the death of her mother. Where, however, a testator bequeathed 100*l.* a-piece to the four sons of A. H. by a former husband, and she had four such children, but one of them was a daughter, Knight-Bruce, V.-C., held, that the daughter took a legacy of 100*l.* (*f*).

Where a testatrix by her Will bequeathed 1,000*l.* to each of the three children of her niece, and confirmed the Will by a codicil in June, 1874; and, at the date of the Will and codicil, the niece had three children living, but in July, 1874, had a fourth child born to her, only the three children were held entitled to legacies (*g*).

Where a testator gave his residue "unto the children of the deceased son (named Bamber) of my father's sister share and share alike," and there were to the knowledge of the testator three such deceased sons, the gift was held void for uncertainty (*h*).

It should be observed, that the principle on which an erroneous statement of the number of a class is rejected does not apply where the Will affords the means of determining which of the class are pointed at (*i*).

(*f*) *Lane v. Green*, 4 De G. & Sm. 239. See *ante*, p. 909, as to the mistaken omission of the name of the legatee.

(*g*) *Re Emery's Estate*, 3 O. D. 300.

(*h*) *Re Stephenson*, [1897] 1 Ch. 75.

(*i*) *Re Hull's Estate*, 21 Beav. 310; *Wrightson v. Calvert*, 1 Johns. & H. 250; *Glanville v. Glanville*, 33 Beav. 302; *Re Mayo*, [1901] 1 Ch. 404. The rule may be thus stated, viz., that in the case of a testamentary gift to a class, describing them as consisting of a specified number which is less than the number in existence at the date of the Will, the Court rejects the specified number on the presumption of mistake, and all the members of the class in existence at the date of the Will are held entitled, unless it can be inferred who are the particular members intended, in which case the Court holds those children entitled to the exclusion of the others. This rule, gathered from the judgment of Sir G. Jessel in *Newman v. Piercey*, 4 C. D. 41, was based by him largely on the rule as stated in *Hawkins on Wills*, p. 62. Vice-Chancellor Wood in *Wrightson v. Calvert*, 1 J. & H. 250, states the principle thus: "The principle of the earlier cases on this subject was to avoid an intestacy by reason of uncertainty. If there is a gift to the two children of A. when A. in fact has three children, you must either act upon the general intent to benefit the class and treat the statement of the number as a mistake or else the gift must be void for uncertainty, it being impossible to say which two out of the three are to take." Sir

SECTION III.

Specific Legacies.

Of legacies there are two kinds: a general legacy and a specific legacy. A legacy is "general" when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind: A legacy is "specific" when it is a bequest of a *specified* part of the testator's personal estate which is so distinguished (*j*). Thus, for example, "I give a diamond ring" is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while "I give the diamond ring presented to me by A." is a specific legacy, which can only be satisfied by the delivery of the identical subject. Again, if the testator, having many brooches or horses, bequeath "a brooch" or "a horse" to B.; in these cases the legacy is general (*k*). But a bequest

General legacies.

Specific legacies.

G. Jessel points out in *Newman v. Piercey* (*ubi supra*) that this rule is rather too wide without the qualification, "unless there is some evidence to enable the Court to find out who are meant."

(*j*) The fact, however, that a specific legacy is given or a specific part of the personalty excepted out of a general residue does not make a gift of that general residue specific: *Re Ovey*, 20 C. D. 676. In *Bothamley v. Sherson*, L. R. 20 Eq. 304, 308, 309, Jessel, M. R., defines a specific legacy as follows:—"In the first place it is a part of the testator's property; in the next place it must be a part emphatically as distinguished from the whole: it must be what has been sometimes called a severed or distinguished part: it must not be the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. If it satisfied both conditions that it is a part of the testator's property itself, and is a part as distinguished from the whole, or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy." This definition was referred to and repeated by the same learned judge in a later case: *Re Ovey*, 20 C. D. 676, 681, in which case, upon appeal to the House of Lords (*sub nom. Robertson v. Broadbent*, 8 App. Cas. 812), Lord Selborne, L. O. (with the expressed approval of Lord Blackburn) defined a specific legacy as "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate." See also *Giles v. Melsom*, L. R. 6 H. L. 24, 29, where a specific devise or a specific bequest is defined by Lord Selborne as "a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie."

(*k*) A legacy of fifty shares in the York Union Banking Co. was held equivalent to a legacy of the value of the shares at the testator's death: *Re Gray*, 36 C. D. 205; cf. also *Macdonald v. Irvine*, 8 C. D. 102, where a legacy of 500 Egyptian Nine per cent. Bonds was held not to be specific, though the testator had such bonds at the time.

of "such part of my stock of horses which A. shall select, to be fairly appraised, to the value of 800*l.*" (*l*), or of "all the horses which I may have in my stable at the time of my death" (*m*), is specific.

Distinction
between
general and
specific
legacies.

The distinction between these two sorts of legacies is of the greatest importance: for, as it will hereafter more fully appear, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; and if given to a person *in esse* and it produces income, it carries the income from the testator's death (*n*); while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that, though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage (*o*).

Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails: Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet if the testator had no horse, the executor is not to buy a grey one (*p*): On the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee (*q*).

It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption (*r*). But this has since been repeatedly denied (*s*). And it has even been held that a legacy may be specific, notwithstanding the testator

(*l*) *Richards v. Richards*, 9 Price, 226.

(*m*) *Fontaine v. Tyler*, 9 Price, 98, by Richards, C.B. See also *Stephenson v. Dowson*, 3 Beav. 349, *per* Lord Langdale.

(*n*) *Re Compton*, [1914] 2 Ch. 119.

(*o*) *Ashton v. Ashton*, 3 P. Wms. 315, by Lord Talbot, C.

(*p*) *Evans v. Tripp*, 6 Madd. 92.

(*q*) See *Bronsdon v. Winter*, Ambl. 57.

(*r*) *Parrott v. Worsfold*, 1 Jac. & Walk. 601, *post*, p. 923. See also the observations on this case by Jessel, M. R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304, 309, 310.

(*s*) See *post*, p. 923.

expressly provides that it "shall not be deemed specific, so as to be capable of ademption" (*t*).

Where executors assent to specific legacies of shares or mortgages, the costs of transfer, including the executors' own costs in connection therewith, must be borne by the specific legatees (*u*).

Costs of transfer.

A legacy of quantity is ordinarily a general legacy: but there are legacies of quantity *in the nature of* specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians a *demonstrative legacy* (*v*); and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets (*x*); yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets (*y*).

Bequests in the nature of specific legacies, or demonstrative legacies.

The Courts in general are averse from construing legacies to be specific: and the intention of the testator, with reference to the thing bequeathed, must be clear (*z*). Having thus premised, it may be advisable to consider some instances in which legacies have been held to be specific, with reference to—1. Money;

(*t*) *Jacques v. Chambers*, 2 Coll. 435; but see *Re Compton*, [1914] 2 Ch. 119.

(*u*) *Re Grosvenor*, [1916] 2 Ch. 375.

(*v*) "If the testator doe devise tenne quarter of corne coming of the corne which shall growe in such a soyle, or two tunnes of wine of his grapes in such a vineyard, or tenne lambs of such a flocke, though so much corne, or wine, or so many lambs doe not arise of the things abovesaid, yet the heire or executor is compellable by law to make them good *integraliter*: because he may seeme to have mentioned the soyle, the vineyard, and the flocke, rather by way of *demonstration* than by way of condition": Fulbecke's Parallelo, p. 37, Edition 1618.

(*x*) *Mann v. Copeland*, 2 Madd. 223; *Fowler v. Willoughby*, 2 Sim. & Stu. 358; *Wilcox v. Rhodes*, 2 Russ. Chanc. Cas. 445; *Creed v. Creed*, 11 Cl. & F. 491, 509, by Lord Cottenham; *Tempest v. Tempest*, 7 De G. M. & G. 470, 473, *per* Lord Cranworth.

(*y*) *Livesay v. Redfern*, 2 Y. & O. 90; *Robinson v. Geldard*, 3 Mac. & G. 744, 745; *Tempest v. Tempest*, 7 De G. M. & G. 473, by Lord Cranworth; *Mullins v. Smith*, 1 Dr. & Sm. 204. See also, for further instances of demonstrative legacies, *Williams v. Hughes*, 24 Beav. 474; *Paget v. Huish*, 1 Hemm. & M. 663; *Jones v. Southall*, 32 Beav. 31; *Bevan v. Att.-Gen.*, 4 Giff. 361; *Disney v. Grosse*, L. R. 2 Eq. 592; *Hodges v. Grant*, L. R. 4 Eq. 140.

(*z*) *Ellis v. Walker*, Ambl. 310; *Kirby v. Potter*, 4 Ves. 748; *Innes v. Johnson*, 4 Ves. 568; *Webster v. Hale*, 8 Ves. 413; *Sayer v. Sayer*, 7 Hare, 377. Legacies though in fact specific, may be treated by the testator as general legacies, and in that case they will be treated as general legacies for the purposes of administration: *Re Compton*, [1914] 2 Ch. 119.

securities for money, debts, &c.: 2. Bequests connected with the realty: 3. Bequests contained in a residuary clause.

1. Legacies
of money,
securities for
money, debts,
&c. :
money :

1st. Legacies of money, securities for money, debts, &c. Under some circumstances, even pecuniary legacies are held to be specific; as of a certain sum of money in a certain bag or chest (*a*), or in the hands of A. (*b*); or of 200*l.*, the balance due to the testator from his partner on the last settlement between them, *if the testator did not draw such money out of the trade* before he died (*c*). But a legacy of “400*l.* to be paid to A. in cash” is a general legacy (*d*). So a legacy of money, to procure a specified object for the legatee: as of a sum to buy a ring (*e*), or to purchase lands (*f*) or government securities (*g*) for the legatee, is a general legacy. So a bequest of an annuity out of, or charged on, the personal estate is a general legacy (*h*).,

A *money* legacy will not be rendered specific, by its payment being postponed until a particular investment of a fund takes place; as where the bequest is to A. and B. of 1,000*l.* each, “which legacies I direct to be *paid* so soon as my property in India shall be realized in England” (*i*); in which case the legatees are entitled to satisfaction, although all the property in India belonging to the testator should have been transmitted to England in his lifetime. So where sums of money are bequeathed by a testator, who has property in England and India, to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific (*k*).

stocks, shares,
&c.

Stock, or government securities, or shares in public companies, may be specifically bequeathed, where, to use the expression often applied, there is a clear reference to the “*corpus*” of the fund. Thus, the word “my” preceding the word “stock” or

(*a*) *Lawson v. Stitch*, 1 Atk. 508.

(*b*) *Crocket v. Crocket*, 2 P. Wms. 164.

(*c*) *Ellis v. Walker*, Ambl. 310.

(*d*) *Richards v. Richards*, 9 Price, 226.

(*e*) *Apreece v. Apreece*, 1 Ves. & Beam. 364.

(*f*) *Hinton v. Pinke*, 1 P. Wms. 539.

(*g*) *Lawson v. Stitch*, 1 Atk. 507. So a direction to invest so much money as will produce a certain amount of stock is a pecuniary legacy: *Edwards v. Hall*, 11 Hare, 23.

(*h*) *Alton v. Medlicott*, cited in *Lewin v. Lewin*, 2 Ves. Sen. 417; *Creed v. Creed*, 11 Cl. & F. 491, 508, by Lord Cottenham.

(*i*) *Sadler v. Turner*, 8 Ves. 617; *Raymond v. Broadbelt*, 5 Ves. 199.

(*k*) *Kirkpatrick v. Kirkpatrick*, cited in *Roberts v. Pocock*, 4 Ves. 158.

“annuities” has been held sufficient to render the legacy specific, so as only to pass (before the Wills Act) the property of that description which belonged to the testator at the date of his Will (l): as where the bequest is of “my capital stock of 1,000*l.* in the India Company’s Stock” (m): or a legacy is given “of my stock,” or in “my stock,” or “part of my stock” (n), or “my shares in the Grand Junction Canal Navigation Company” (o), or of “all my stock in the Midland Railway Company” (p), or where a life interest is given in “the whole of the remainder of my dividends” (q). So where the testator, being possessed of 5,000*l.* stock, bequeathed “all the stock which I have in three per cents. being about 5,000*l.*,” Lord Thurlow held the legacy specific (r).

In *Parrott v. Worsfold* (s), where a testator, reciting that he had 1,500*l.* five per cents., gave it to A., and then gave to B. all other *his* stocks that he might be possessed of at the time of

(l) See *Goodlad v. Burnett*, 1 Kay & J. 341. In cases to which the Wills Act applies, if a particular thing is referred to and bequeathed as “my ring” or “my horse,” the contrary intention to which the 24th sect. of the Act refers, appears (as it seems) by the Will, and the Will speaks from the date of its execution, but when the bequest is of that which is generic—of that which may be increased or diminished—the Act requires something more on the face of the Will for the purpose of indicating such contrary intention than the mere circumstance that the subject of the bequest is designated by the pronoun “my”: *ibid.* p. 348, by Wood, V.-C.; See *Drake v. Martin*, 23 Beav. 89, note; *Re Clifford*, [1912] 1 Ch. 29. Legacies, which before the passing of the Wills Act would have been specific, remain specific: *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(m) *Ashburner v. McGuire*, 2 Bro. C. C. 108; *Barton v. Cooke*, 5 Ves. 461; *Norris v. Harrison*, 2 Madd. 279, 280.

(n) *Kirby v. Potter*, 4 Ves. 750, 751, by Lord Alvanley; *Davies v. Fowler*, L. R. 16 Eq. 308.

(o) *Miller v. Little*, 2 Beav. 259; *Measure v. Carleton*, 30 Beav. 538; The word “my” is not required to make a gift specific: *Hosking v. Nicholls*, 1 Y. & C. C. 478; *Vaughan v. Buck*, 1 Phil. 75. It seems doubtful whether the word “now” is sufficient: *Cole v. Scott*, 1 Mac. & G. 518; *Page v. Young*, L. R. 19 Eq. 501; *Re Horton*, [1920] 2 Ch. 1. An instruction to *sell* for the benefit of the legatee has been held sufficient: *Ashton v. Ashton*, 3 P. Wms. 384; but a direction to transfer the sum of 1,000*l.* consols was held not sufficient: *Sibley v. Perry*, 7 Ves. 522.

(p) *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(q) *Vincent v. Newcombe*, 1 Younge, 599.

(r) *Humphreys v. Humphreys*, 2 Cox, 184. See also *Cochran v. Cochran*, 14 Sim. 343; *Kampf v. Jones*, 2 Keen, 756; *Shuttleworth v. Greaves*, 4 M. & C. 35; *Gordon v. Duff*, 28 Beav. 519.

(s) 1 Jac. & Walk. 594. In referring to this case in *Bothamley v. Sherson*, *ubi supra*, at p. 310, Sir G. Jessel, M. R., says: “Sir Thomas Plumer held that such a gift was not specific, but he so held, on the ground I have mentioned, that he thought you could not have a specific legacy that was not capable of ademption. That, as I have said before, is not a sound ground to take.”

his death: Sir Thomas Plumer, M. R., held that the latter bequest was not specific; for that the gift comprehended all the stock that he might subsequently acquire, and if he had sold out and bought more, that would have been included (*t*); and his Honour observed, that although the word "my" is evidence of the legacy being specific, where the particular stock is also referred to, yet it is not enough alone. So in *Dummer v. Pitcher* (*u*), a testator, before making his Will, transferred two sums of four per cents. and five per cents., which were then the whole of his funded property, into the joint names of himself and his wife: By his Will he gave his leasehold houses and all *his* funded property or estate of what kind soever, to trustees, in trust for his wife for life, and after her decease, in trust (amongst other things) to pay certain legacies of four per cent. stock, amounting within 50*l.*, to the stock of that description which he had so transferred; and he gave the residue of his estate to A. and B.: He afterwards purchased further sums of five per cents. in the names of himself and his wife, and died in her lifetime, having no stock except that before-mentioned, exclusive of which his property was not sufficient to pay his legacies: And it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham, that the wife, on her husband's death, became absolutely entitled, by survivorship, to the stock standing in the joint names, whether transferred before or after the date of the Will; and that the bequest of the testator's funded property was not sufficiently specific, or pointing to the stock which thus became her property, to put her to her election to take under the Will (*v*). So in *Auther v. Auther* (*x*), a legacy of 10,000*l.* consols "now standing in my name," was held not to be specific; inasmuch as the context showed that the testator meant to use the words as designating the value of 10,000*l.* consols, and not the sum itself. And here it may be

(*t*) But see *post*, p. 923.

(*u*) 5 Sim. 35; 2 Mylne & K. 262. According to Sir George Jessel, M. R., in *Bothamley v. Sherson*, *ubi supra*, at p. 310, the decision in this case proceeded on the ground that where you have the word "my" preceding the gift of the described article, and that followed by a gift of the residue of the estate, there is no intention shown to sever the article from the rest of the property; that the testator was merely enumerating the particulars of which the property consisted.

(*v*) See also *Laurie v. Clutton*, 15 Beav. 131, 144.

(*x*) 13 Sim. 422; cf. *Re Gray*, 36 C. D. 205; *Macdonald v. Irvine*, 8 C. D. 102.

again stated that legacies though in fact specific may be treated by the testator as general legacies (*y*).

It must further be observed, that the mere possession by the testator, at the date of his Will, of stock, &c., of equal or larger amount than the legacy, will not make the bequest specific, when it is given *generally* of stocks or annuities (*z*), or of stocks or annuities *in* particular funds (*a*), without further explanation: for the testator might mean only to direct his executor to purchase with his general estate so much stock, &c., in the fund described; and therefore that clear intention, which (as it has before been observed) (*b*) is requisite for making a legacy specific, does not here exist (*c*). If, indeed, it clearly appears from the context, that the testator meant to bequeath the *identical* stock, &c., he was possessed of at the date of the Will, such manifest intention will render the legacy specific, although the testator has not *expressly* declared such intention, nor expressly referred to the stock: Thus, if a person having 1,000*l.* three per cent. consols, bequeath 1,000*l.* three per cent. consols to trustees, in trust to *sell* for the benefit of the legatee, the bequest will be specific; the intention being manifest, not conjectural, from the direction to *sell* three per cent. consols, that the testator referred to the stock he *then* had (*d*).

In *Hayes v. Hayes* (*e*), a testator gave to his wife, Fanny Hayes, the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed

(*y*) *Re Compton*, ante, p. 917.

(*z*) *Macdonald v. Irvine*, 8 C. D. 102. The gift of a larger sum of stock specifically will pass a smaller: *Ashton v. Ashton*, 3 P. Wms. 384; *Page v. Young*, L. R. 19 Eq. 501, 507; but the excess generally will not pass: *Hotham v. Sutton*, 15 Ves. 319; that is, unless the Court think that the smaller figure was a mistake for the larger.

(*a*) *Simmons v. Vallance*, 4 Bro. C. C. 345; *Webster v. Hale*, 8 Ves. 410; *Sibley v. Perry*, 7 Ves. 523, 529, 530; *Wilson v. Brownsmith*, 9 Ves. 190. But see *Avelyn v. Ward*, 1 Ves. Sen. 424. As to the possession of stock to the particular amount mentioned in the bequest and no more, see *Jeffreys v. Jeffreys*, 3 Atk. 120.

(*b*) *Ante*, p. 917.

(*c*) See further illustrations of the same principle applied to India bonds, in *Sleece v. Thorington*, 2 Ves. Sen. 562, 563; *Gillaume v. Adderley*, 15 Ves. 385, 389; and to canal shares, in *Robinson v. Addison*, 2 Beav. 515.

(*d*) *Ashton v. Ashton*, Cas. temp. Talb. 152; *Simmons v. Vallance*, 4 Bro. C. C. 348. For a further instance, see *Sleece v. Thorington*, 2 Ves. Sen. 561, 564. See also *Mullins v. Smith*, 1 Dr. & Sm. 204; *Hill v. Hill*, 11 Jur. N. S. 803; *Page v. Young*, L. R. 19 Eq. 501.

(*e*) 1 Keen, 97.

of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary: On the death of his wife he gave to his daughter, Jane Hayes, 200*l.* stock three per cent. reduced annuities, and to two other persons, 50*l.* three per cent. reduced annuities respectively, and to his son the residue of his property, after paying those legacies: And he appointed two persons his executors and trustees: At the date of his Will the testator had 700*l.* three per cent. reduced annuities, but he afterwards sold out that stock and invested part of the produce on mortgage: It was held by Lord Langdale, M. R., that the gift to Fanny Hayes of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock, but that the other legacies were general, and that Fanny Hayes took only a life interest in the testator's residuary estate.

Again, when a legacy of money is given *out* of a particular stock, of which the testator was possessed at the date of the Will, without anything expressive of the testator's intention, as where the bequest is of "1,000*l.* *out of my* reduced bank annuities three per cents.," the legacy will not be specific (*f*); but a demonstrative legacy as above described (*g*). Where, indeed, a clear intention appears, *upon other parts of the Will*, that the testator intended to bequeath so much of the *identical* stock or annuities which he had, the legacy will be considered specific (*h*).

(*f*) *Kirby v. Potter*, 4 Ves. 748; *Deane v. Test*, 9 Ves. 146, 152. "If," said Lord Alvanley, M. R., in *Kirby v. Potter*, *ubi supra*, "the legacy given had been 'of my stock,' or 'in my stock,' or 'part of my stock,' I should have held it clearly a specific gift of an aliquot part of the stock." And where there was a bequest of 500*l.* *consols* out of my 3 per cent. consols the legacy was held to be *specific*: *Mullins v. Smith*, 1 Dr. & S. 204. So also in *Hosking v. Nicholls*, 1 Y. & C. C. C. 478, where the testator by his Will gave to trustees 4,000*l.* capital stock in the 3 per cent. consolidated bank annuities or "in whatever of the government funds the same should be found invested" upon trust to assign and transfer the capital stock of 4,000*l.* unto and among the persons mentioned, the legacy was held to be specific, and the Vice-Chancellor said: "If the testator had meant to give a general legacy he would probably have said no more than that he gave 4,000*l.* consols, but he does more than that; he bequeaths 4,000*l.* in the 3 per cent. consols or in whatever government funds the same shall be found invested." See also *Davies v. Fowler*, L. R. 16 Eq. 308.

(*g*) *Ante*, p. 917; *Rogers v. Clarke*, 1 Coop. 376. So, where the testator gives an annuity "*from my funded property*," *Attwater v. Attwater*, 18 Beav. 330.

(*h*) *Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Morley v. Bird*, 3

So where a certain sum is given, and the stock, &c., in which it is invested, at the time of making the bequest, is described in the Will, that circumstance alone will not make the legacy specific: As, where the bequest is “to B., the sum of 12,000*l.* of my *funded* property, to be transferred in his name, or as it shall appear most beneficial for his interest, by my executor” (*i*).

But there is, it seems, a distinction between a bequest of *money* out of stock, and a bequest of *stock* out of stock. Thus where a testatrix bequeathed the sum of 4,000*l.* capital stock in the 3*l.* per cent. consols, or in whatever of the government funds the same shall be found invested, it was held by K. Bruce, V.-C., that this was a specific legacy (*k*).

In *Parrott v. Worsfield* (*l*), Sir Thomas Plumer appeared to be of opinion, that a Will made now cannot contain a specific bequest of what may be bought hereafter; and he observed, that the ordinary criterion of a specific bequest is, that it is liable to ademption (*m*). But in a later case it was determined, that there may be a specific bequest of stock, of which a testator is not possessed, at the making of his Will, but of which he *may* be possessed *at his death* (*n*). So where a testator bequeathed the dividends, &c., of all stocks he should be entitled to, at the time of his decease, in the public funds: and he had 10,000*l.* consols at his death: it was held that this was a specific bequest of that sum (*o*).

It has been decided, after much consideration, that evidence

Admissibility of evidence as to whether bequests of stock are specific.

Ves. 628, 631. See *Townsend v. Martin*, 7 Hare, 471, and note (*f*), *supra*.

(*i*) *Lambert v. Lambert*, 11 Ves. 607. See also for another instance, *Gillaume v. Adderley*, 15 Ves. 885; and see further, *Le Grice v. Finch*, 3 Meriv. 50; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Mytton v. Mytton*, L. R. 19 Eq. 30. Cf. *Page v. Young*, L. R. 19 Eq. 501; *Re Pratt*, [1894] 1 Ch. 491.

(*k*) *Hosking v. Nicholls*, 1 Y. & Coll. C. C. 478. See also note (*f*), *supra*.

(*l*) 1 Jac. & Walk. 601, *ant* 2, p. 919.

(*m*) See also *Howe v. Lord Dartmouth*. 7 Ves. 147, 148, by Lord Eldon. As to the true test, see the judgment of Lord Cottenham in *Bethune v. Kennedy*, 1 M. & C. 114.

(*n*) *Fontaine v. Tyler*, 9 Price, 94; *Queen's College v. Sutton*, 12 Sim. 521. See also the judgment of Lord Cottenham, in *Bethune v. Kennedy*, 1 M. & C. 114, and the judgment of Sir G. Jessel, M. R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(*o*) *Stephenson v. Dowson*, 3 Beav. 342.

specific or pecuniary. In the *Attorney-General v. Grote* (*p*), a legacy of "100*l.* Long Annuities Stock," was held by Lord Eldon (reversing the decision of Sir W. Grant) (*q*), to be pecuniary and not specific; his Lordship coming to that conclusion upon the context of the Will and the terms of the gift, as compared with those of the other bequests, *and upon evidence of the state of the funded property*. Again, in *Boys v. Williams* (*r*), a testatrix, by a codicil, gave "to A. and M. 50*l.* each of Bank Long Annuities now standing in my name": At the date of the codicil and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock: Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted by Lord Brougham (reversing the decision of Sir L. Shadwell, V.-C. (*s*). On the effect of that evidence, and the language of the testamentary papers taken together, the bequests to A. and M. were held by his Lordship not to be specific, but mere pecuniary legacies, intended to be charged on the stock in question (*t*).

Debts and securities.

A debt due to the testator may be specifically bequeathed: as where there is a bequest of "the money now owing to me from A." (*u*), or "the money due to me on the bond of A.," or "*my* mortgage" (*x*), or "the interest of 7,000*l.* secured on mortgage of an estate at W., in the county of N., belonging to R. T." (*y*), or "*my* East India Bonds" (*z*), or "*my* note owing from A." (*a*):

(*p*) 2 Russ. & M. 699. But evidence of declarations of the testator of his intentions is not admissible: *Horwood v. Griffith*, 4 De G. M. & G. 700. See *post*, p. 956.

(*q*) 3 Meriv. 316.

(*r*) 2 Russ. & M. 689.

(*s*) 3 Sim. 563.

(*t*) See also *Collison v. Curling*, 9 Cl. & F. 88; *Warren v. Postlethwaite*, 2 Coll. 116, 121; *Innes v. Sayer*, 3 Mac. & G. 606; *Horwood v. Griffith*, 4 De G. M. & G. 700.

(*u*) *Ellis v. Walker* Ambl. 309; *Duncan v. Duncan*, 27 Beav. 386; *Re Burke*, [1914] 1 Ir. R. 81.

(*x*) *Sidebotham v. Watson*, 11 Hare, 170. But where a sum of money is given, and the mortgage is merely mentioned as descriptive of the then situation of the money, the legacy is general: *Le Grice v. Finch*, 3 Meriv. 50.

(*y*) *Gardner v. Hatton*, 6 Sim. 93.

(*z*) *Sleech v. Thorington*, 2 Ves. Sen. 562, 563.

(*a*) *Drinkwater v. Falconer*, 2 Ves. Sen. 622. So where the legacy is of "all such sums of money as my executors may, after my death, receive on the interest note given to me by Messrs. C., bankrupts, &c.," it is specific: *Fryer v. Morris*, 9 Ves. 360.

Or where the testator, *reciting that he is possessed* of about 7,000*l.* Navy Bills, gives the same to his executor, to receive the interest, and lay out the same in the funds, to such uses as his daughter shall appoint (*b*). So where the testator bequeathed to his sister “the interest arising from her husband’s bond to me for principal 3,500*l.* sterling for life, to her separate use, amounting to 175*l.* sterling per annum,” and on the decease of his sister, the principal of the said bond to her four daughters, to be equally divided amongst them: Lord Thurlow decided that the bond was specifically given (*c*).

Again, where the bequest was “to my granddaughter the sum of 40*l.*, *being part of a debt* due to me for rent from A., she allowing what charges shall be expended in getting the same: Item, I bequeath to my grandsons C. & D., the rest and residue of what is due to me from the said A., which is about 40*l.* more, in equal shares, and they allowing charges as aforesaid”: these were held specific legacies (*d*). So a legacy of “1,000*l.* being some part of moneys received from my debtor, Mrs. A. G., deceased, but not remitted to me,” was held specific (*e*). So a gift to A. B. of “the sum of 100*l.*, which said sum is owing to me by bond from her father,” was held to be a specific, and not a demonstrative legacy (*f*).

But where a legacy is bequeathed *out* of a debt it will not, generally speaking, be a regular specific legacy, but a bequest, *in the nature of a specific legacy*, or a *demonstrative* legacy, according to the distinctions already stated, with regard to legacies *out* of a particular stock (*g*). Such legacies, therefore, are, in one sense only, specific, viz., that against all other general legatees they have a precedency of payment out of the debt or security: but in another sense they are general, since, if the debt be not in existence at the testator’s death, or if it be insufficient to pay the legacies, the legatees will be entitled to

(*b*) *Pitt v. Camelford*, 3 Bro. C. C. 160.

(*c*) *Ashburner v. M’Guire*, 2 Bro. C. C. 108. This case has been followed by *Chaworth v. Beech*, 4 Ves. 555; *Innes v. Johnson*, 4 Ves. 563; *Stanley v. Potter*, 2 Cox, 180. But see *Coleman v. Coleman*, 2 Ves. 639.

(*d*) *Ford v. Fleming*, 1 Eq. Cas. Abr. 302, pl. 3.

(*e*) *Nelson v. Carter*, 5 Sim. 530. See also *Basan v. Brandon*, 8 Sim. 171.

(*f*) *Davis v. Morgan*, 1 Beav. 405.

(*g*) *Ante*, p. 922; *Campbell v. Graham*, 1 Russ. & M. 453. A bequest of 10,000*l.* sterling “being my share of the capital now engaged in the banking business,” was held by Romilly, M. R., to be a demonstrative legacy: *Sparrow v. Josselyn*, 16 Beav. 135.

satisfaction out of the general estate of the testator (*h*). This general rule is obviously, as in the case of a legacy *out* of stock, subject to be controlled by the manifest intention of the testator to bequeath so much of the *identical* debt (*i*).

Forgiveness
of debt.

The forgiveness by will of a debt owing to the testator is a specific legacy and will not abate with the general legacies (*j*).

The income arising from personalty specifically bequeathed is apportionable under the Apportionment Act, 1870 (*k*), as between the specific legatee and the estate of the testator (*l*).

2. Bequests
connected
with the
realty.

2. Bequests connected with the realty. Every devise of land is specific (*m*); and so a bequest of a lease for years of a farm (*n*), or of tithes (*o*), is a specific legacy.

So a bequest of a rent out of a term of years is specific: as where the testator bequeathed 40*l.* a year to A. for life, out of his chattel estate at Kenn, and 10*l.* a year to B. for life, out of the same estate, which he gave to C.; these several bequests were held specific (*p*). But if it be apparent that the testator's meaning is to give the legatee *an annuity at all events*, the legacy will be a general one, though it is directed to be paid *out* of an estate or the rents of it; consequently, though the fund, out of which the legacy is directed to be paid, should fail, the legatee will be entitled to have his legacy made good out of the general personal estate (*q*).

(*h*) For examples, see *Roberts v. Pocock*, 4 Ves. 150; *Smith v. Fitzgerald*, 3 Ves. & Beam. 5; *Acton v. Acton*, 1 Meriv. 178; *ante*, p. 917, note (*v*).

(*i*) *Badrick v. Stevens*, 3 Bro. C. C. 431.

(*j*) *Re Wedmore*, [1907] 2 Ch. 277.

(*k*) 33 & 34 Vict. c. 35.

(*l*) *Pollock v. Pollock*, L. R. 18 Eq. 329, in which case Malins, V.-C., corrected his expression to the contrary in *Whitehead v. Whitehead*, L. R. 16 Eq. 528. See also *Capron v. Capron*, L. R. 17 Eq. 288; *Hasluck v. Pedley*, L. R. 19 Eq. 271, *per* Jessel, M. R.

(*m*) *Forrester v. Leigh*, Ambl. 173. It was at one time supposed that since the Wills Act (1 Vict. c. 26), a residuary devise of real estate is not specific: *Dady v. Hartridge*, 2 Dr. & Sm. 236; but it is now established that a residuary devise ranks for the purpose of payment of debts *pari passu* with specific devises. See *post*, Pt. IV. Bk. I. Ch. II. § I.

(*n*) *Long v. Short*, 1 P. Wms. 403.

(*o*) *Rudstone v. Anderson*, 2 Ves. Sen. 418; *Hone v. Medcraft*, 1 Bro. C. C. 263.

(*p*) *Long v. Short*, 1 P. Wms. 403; and see the extract from Reg. Lib. in Cox's note. See also *Creed v. Creed*, 11 Cl. & F. 508, by Lord Cottenham.

(*q*) *Mann v. Copeland*, 2 Madd. 223; *Vickers v. Pound*, 6 H. L. O. 885.

So if, instead of an annuity, a gross sum be given *out of* a term or estate, it would seem that such bequest would operate as a charge only on the property and be considered as a demonstrative legacy, *i.e.* the gift of so much money, intended for the legatee at all events, with a fund (the estate) particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general assets (*r*). This is another instance of a bequest in the nature of a specific legacy, or a *demonstrative* legacy.

Accordingly, in the case of *Wilcox v. Rhodes* (*s*), a testator gave a number of legacies, adding, "I guarantee my estate at C. for the payment of the above legacies;" and in the subsequent part of his Will he gave many other legacies: It was holden, that the first class of legacies were not specific, and, failing the estate at C., were to be borne by the general personal estate (*t*).

But though general legacies do not become specific because they are charged upon, or payable out of the proceeds of real estate, yet if the testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be properly specific (*u*). So if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*x*). Again, if annuities are given as specific interests in the real estate, they will not be affected by a general charge of legacies: and if the land be sold for the payment of the

(*r*) *Savile v. Blakett*, 1 P. Wms. 778; *Fowler v. Willoughby*, 2 Sim. & Stu. 354; *Livesay v. Redfern*, 2 Y. & Coll. 90.

(*s*) 2 Russ. Chanc. Cas. 452.

(*t*) See accord. *Creed v. Creed*, 11 Cl. & F. 510, by Lord Cottonham.

(*u*) *Page v. Leapingwell*, 18 Ves. 463; *Williams v. Hughes*, 24 Beav. 474. The authority of *Page v. Leapingwell*, (*ubi supra*) applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which case it is indifferent whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of "residue" (*Petre v. Petre*, 14 Beav. 197, 200; *Elwes v. Causton*, 30 Beav. 554, 555; *Walpole v. Apthorp*, L. R. 4 Eq. 37); but does not apply where the testator does not know the amount of the fund, nor could be taken to have acted on a conception of it: *De Lisle v. Hodges*, L. R. 17 Eq. 440; *De Quetteville v. De Quetteville*, 92 L. J. 758.

(*x*) *Dickin v. Edwards*, 4 Hare, 273, 276. See also *Williams v. Hughes*, 24 Beav. 474, 480.

legacies, it must be sold subject to the annuities; or if sold discharged of them, the proceeds must be subject to the same liability, inasmuch as such annuities are, as to the real estates, entitled to priority over the legacies (*y*).

3. Bequests contained in a residuary clause :

3. Bequests contained in a residuary clause: The question, whether such bequests are specific or general, may become important, where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it, from debts and legacies, and charge the realty therewith (*z*): or where the personal estate so bequeathed comprises property which is wearing out rapidly (such as leaseholds or Long Annuities), and it is given to one for life, remainder to another.

bequest of general personal estate :

The bequest of all a man's personal estate generally is not specific: the very terms of such a disposition demonstrate its generality (*a*). And the circumstance of the bequest of the general personal estate being in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy (*b*).

But if a man having personal property at A. and elsewhere, bequeath all his personal estate *at A.* to a particular person, the legacy is specific; and if there is a deficiency of assets to pay other legacies, such a legacy will not abate with the other legacies (*c*). So where the testator bequeaths the residue of all his personal estate *in the Island of Jamaica*, this is a specific legacy (*d*): and so is a bequest of all the testator's goods and chattels in a particular county (*e*).

(*y*) *Spong v. Spong*, 3 Bligh, N. S. 84; *Creed v. Creed*, 11 Cl. & F. 491, 507; *Conron v. Conron*, 7 H. L. C. 168.

(*z*) See *post*, Pt. IV. Bk. I. Ch. II. § I.

(*a*) *Fairer v. Park*, 3 C. D. 309; *Ouseley v. Anstruther*, 10 Beav. 543; cf., however, *Shepherd v. Beetham*, 6 C. D. 597, where a bequest to a hospital of "all other my personal estate and effects which I can by law bequeath to such an institution," was held to be specific. See also *Powell v. Riley*, L. R. 12 Eq. 175. In *Jones v. Bruce*, 11 Sim. 221, 228, Sir L. Shadwell said that the gift of the whole personal estate was as specific as if the testator had enumerated every chattel and then said, "I give them to my wife." That dictum (which was not necessary for the decision) is disapproved by Lord Selborne in *Robertson v. Broadbent*, 8 App. Cas. 812, 816.

(*b*) *Howe v. Lord Dartmouth*, 7 Ves. 138.

(*c*) Treat. Eq. B. 4, Pt. 1, Ch. 2, s. 5; *Sayer v. Sayer*, 2 Vern. 688.

(*d*) *Nisbett v. Murray*, 5 Ves. 150. See also *Robinson v. Webb*, 17 Beav. 260.

(*e*) *Moore v. Moore*, 1 Bro. O. C. 127. So of all the goods in a particular room: *Green v. Symonds*, 1 Bro. C. C. 129, *in notis*; or of

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist (*f*). Nor does the fact that a specific legacy is given or a specific part of the personalty excepted out of a general residue, make a gift of that general residue specific (*g*). But cases of this kind obviously depend on the construction of the particular Will in which the gift is found: And sometimes, where there has been an enumeration of items coupled with a gift of the general personal estate, the particular items have been held not to be included in the general personal estate, but to be disposed of specifically (*h*).

residuary clause containing an enumeration of particular things:

An indication in the Will of an intention that the property should continue to be enjoyed by the tenant for life *in specie* as it existed at the date of the Will, does not make a legacy specific in its strictest sense (*i*).

If a person bequeaths personal property *specifically* to one person for life, with remainder over afterwards, it is clear that the property must be enjoyed *in specie* by the tenant for life, notwithstanding there is a danger that one object of the testa-

in what cases when personal property is bequeathed to one for life, remainder over, the

"all plate, linen, and furniture in my house at A., or which shall be therein at the time of my decease": *Gayre v. Gayre*, 2 Vern. 538; *Shaftesbury v. Shaftesbury*, *ibid.* 747; *Land v. Devaynes*, 4 Bro. C. C. 537.

(*f*) *Taylor v. Taylor*, 6 Sim. 246; *Pickup v. Atkinson*, 4 Hare, 628; *Sutherland v. Cooke*, 1 Coll. 502. In *Clarke v. Butler*, 1 Meriv. 304, the bequest was as follows: "As to all that my leasehold house in L—, and all my household goods and furniture there and at S—, and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c., I give and bequeath the same to A.:" By a codicil he revoked the bequest "of the residue" to A., and gave "the residue of his said personal estate" to B.: And Sir W. Grant, M. R., held that the gift of the general residue only, and not of the articles enumerated, was revoked by this codicil. In *Taylor v. Taylor*, *ubi supra*, Sir L. Shadwell distinguished the Will before him from that which was under consideration in *Clarke v. Butler*, on the ground that in the latter case the gift was divided into two distinct sentences, and the judgment as to all the things not connected with the leasehold house, though given in a weak form, was supported by the gift in the second codicil: whereas, in the Will before him, there was no division of the sentence, and the things specifically named could not be separated from those given in general terms.

(*g*) *Re Ovey*, 20 C. D. 676. Affirmed on appeal to the House of Lords, *sub nom. Robertson v. Broadbent*, 8 App. Cas. 812.

(*h*) *Fitzwilliam v. Kelly*, 10 Hare, 274, by Wood, V.-C.; *Mills v. Brown*, 21 Beav. 1; *Bethune v. Kennedy*, 1 Mylne & Cr. 114. But generally items included in the residue will not be treated as specific: *Re Tootal's Estate*, 2 C. D. 628; *Macdonald v. Irvine*, 8 C. D. 101; *Re Green*, 40 C. D. 610.

(*i*) *Pickering v. Pickering*, 4 M. & Cr. 299. See *Fielding v. Preston*, 1 De G. & J. 438, 444; *Mills v. Brown*, 21 Beav. 14.

tenant for life
shall enjoy
the property
in specie :
The rule in
*Howe v. Lord
Dartmouth*.

tor's bounty will be defeated by the tenancy for life lasting as long as the property endures (*j*). But where the bequest is not *specific*, a rule has been firmly established, which is usually called "The rule in *Howe v. Lord Dartmouth*," having been laid down and acted upon by Lord Eldon in that case (*k*), though it was not the first decision to that effect (*l*). The effect of this rule is, that where a testator limits personal property to one for life with remainder over, it is *primâ facie* to be intended that the testator means that the same property which is enjoyed by the tenant for life should go to those entitled in remainder; and if any part of the property so given be of a wasting nature, as Long Annuities or leasehold estate, in order to effectuate this general purpose of the testator, such wasting property must be sold and *converted* into permanent property; in other words, it must be invested in such securities as are approved by a Court of Equity, for the benefit of all persons interested in it.

But it is quite as well settled as the rule itself, that when any indication is to be found in the Will of an intention by the testator, that the property is to be enjoyed *in specie* in its existing state, it shall be so enjoyed. But though in such case investments may remain, yet debts, such as turnpike bonds, must be realised (*m*).

The rule must prevail unless *some* expression of intention can be gathered from the Will that the property is to be enjoyed *in specie*; for the mere absence of any direction to convert the property is not sufficient to preclude the application of the rule (*n*).

SECTION IV.

The Description of Legacies.

The object of this section is to inquire, to what property legatees are entitled under particular modes of description of the thing bequeathed.

"Goods:"

"Goods," "chattels." The word "goods" is *nomen generalissimum*: and, when construed in the abstract, will com-

(*j*) *Pickering v. Pickering*, 4 M. & Cr. 299.

(*k*) 7 Ves. 137.

(*l*) *Pickering v. Pickering*, 4 M. & Cr. 298.

(*m*) *Holgate v. Jennings*, 24 Beav. 623.

(*n*) The cases decided on this principle will be found collected *post*, Pt. III. Bk. III. Ch. IV. § IV. p. 1123.

prehend all the personal estate of the testator, as stock, bonds, notes, money, plate, furniture, &c. And a bequest of all the testator's "chattels" will have the same effect as a bequest of all his "goods and chattels" (*o*). So the word "effects," standing alone, will pass the whole of the testator's residuary estate (*p*). So the general personal estate will pass under a bequest of the testator's "property" (*q*).

"chattels:"

"effects:"

"property:"

But where the bequest is of "all my goods" (or "of all my chattels") *at a particular place*, the legacy is restricted to such things only as *savour of locality*, as furniture not attached to the freehold, plate, linen, Bank-notes, and ready money (*r*). And under such a bequest, bonds and other *choses in action* do not pass (*s*). Nor will they pass by a bequest of "all things" in a

(*o*) Co. Lit. 118, *b*; Swinb. Pt. 7, § 10, pl. 8; *Crichton v. Symes*, 3 Atk. 62; *Kendall v. Kendall*, 4 Russ. Chanc. Cas. 370.

(*p*) *Campbell v. Prescott*, 15 Ves. 507; *Hearne v. Wigginton*, 6 Mad. 119; *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290. A gift of "all my furniture, plate, linen, and other effects that may be in my possession at the time of my death," was held to pass the residuary personal estate of the testatrix: *Hodgson v. Jex*, 2 C. D. 122. And see *In the goods of Jupp*, [1891] P. 300. A gift of "my sheep and all the rest residue, moneys, chattels, and all other my effects," passes all the freehold as well as the personal estate: *Smyth v. Smyth*, 8 C. D. 561. But a bequest of any money that may result from a sale of my effects, followed by a specific bequest of a watch, was held not sufficient to pass the residue: *In the goods of O'Loughlin*, L. R. 2 P. & D. 102. See *Ponton v. Dunn*, 1 Russ. & M. 402, where, under a bequest of "all other my estate and effects of whatsoever nature or description," an interest in a partnership was held to pass. In the case of *Hall v. Hall*, [1891] 3 Ch. 389, it was held that although in a Will the use of the word "devise" or of the expression "whatsoever the same may be," would not of itself be enough to make the word "effects" include real estate, yet the combination of "devise" with the words, "whatsoever the same may be and wheresoever the same may be situate," followed in a subsequent clause by the word "property" used as equivalent to "effects," was enough to show the intention of the testator to dispose of real estate. This case was affirmed on appeal, [1892] 1 Ch. 361. And see *post*, p. 937, n. (*r*).

(*q*) *Tyrone v. Waterford*, 1 De G. F. & J. 613. A testator "devised and bequeathed his lands and property whatsoever in Australia," together with the arrears of rent to A. and B., their "heirs and assigns:" this was held to pass the testator's personalty in Australia: *Robinson v. Webb*, 17 Beav. 260. A bequest of "my property not in England and in the hands of my attorney abroad, consisting of Russian bonds, &c.," was held to pass all the testator's property abroad without limitations: *Drake v. Martin*, 23 Beav. 89.

(*r*) *Countess of Aylesbury's Case*, cited by Lord Hardwicke, in *Chapman v. Hart*, 1 Ves. Sen. 273; *Green v. Symonds*, 1 Bro. C. C. 129, *in notis*.

(*s*) *Ibid.* *Moore v. Moore*, 1 Bro. C. C. 127; *Jones v. Sefton*, 4 Ves. 166; *Hertford v. Lowther*, 7 Beav. 1. But a bequest of "all my estate and effects in Mauritius" was held to pass the unpaid purchase-money

particular house (*t*). It has been suggested, indeed, that exchequer notes, promissory notes payable to the bearer, exchequer bills, and bills of exchange endorsed in blank, being, according to modern decisions in the Courts of Law, considered rather as money in possession than *choses in action*, might pass under such a bequest as well as Bank-notes (*u*). However, in *Stuart v. Bute* (*x*), Lord Eldon said, "I have seen Lady Aylesbury's case, which is also mentioned by Lord Mansfield in *Miller v. Race* (*y*), but has never been cited accurately: It was a bequest of 'my house, and all that shall be in it at my death:' Lord Hardwicke held that cash passed, and Bank-notes, which Lord Hardwicke there, I do not know why, considered as cash, but not promissory notes and securities, as they were the evidence of title to things out of the house, and not things in it: Bank-notes I think just in the same situation." In *Brooke v. Turner* (*z*), a testatrix bequeathed to her niece, her pictures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house; and all the residue of her estate, both real and personal (except as otherwise disposed of), she gave to her grandchildren; and she directed that, from and after the day of her interment, all the property over which

of real estate in Mauritius sold by the testator to persons residing in that island: *Guthrie v. Walrond*, 22 C. D. 573.

(*t*) *Popham v. Lady Aylesbury*, Ambl. 68. So in *Fleming v. Brook*, 1 Scho. & Lefr. 318, where the bequest was of all testator's property in A.'s house, *except a particular bond*, Lord Redesdale held that, in spite of the inference to be drawn from the exception, *choses in action* generally did not pass. This decision has been doubted. See *Hotham v. Sutton*, 15 Ves. 319; *post*, p. 935, n. (*m*). But it appears to be recognized by Lord Cottenham, when Master of the Rolls, in *Arnold v. Arnold*, 2 Mylne & K. 374. The case of *Fleming v. Brook* (*ubi supra*), which seems to have been decided on the authority of *Moore v. Moore*, 1 Bro. C. C. 127, is referred to with disapproval by Cotton, L. J., in *Re Prater*, 37 C. D. 481, 487, who says, "In *Moore v. Moore* the words were 'goods and chattels,' and Lord Redesdale said that goods and chattels did not apply to notes, bills of exchange, or bonds, and there was not anything to give a more enlarged meaning to those words. I do not think that the case of *Moore v. Moore* has the effect which Lord Redesdale, according to the report, seems to have attributed to it." See also observations of Chitty, J., in *Re Robson*, [1891] 2 Ch. 559, where under a bequest by a testator of his desk "with the contents thereof," it was held the words were sufficient to pass all the *choses in action*, including those which were negotiable only after indorsement by the executors; and see *Re O'Brien*, [1906] 1 Ir. R. 649.

(*u*) *Collins v. Martin*. 1 Bos. & Pull. 648; *Wookey v. Pole*, 4 B. & A. 1. See *ante*, p. 598.

(*x*) 11 Ves. 662; *S. C.*, in Dom. Proc. 1 Dow. 73.

(*y*) 1 Bur. 457.

(*z*) 7 Sim. 671.

she had any disposing power, in and about her dwelling-house (except what she had otherwise given) should belong to her niece, and not be subject to diminution except by her personal act and authority: After the testatrix's death, guineas, sovereigns, Bank of England, country bank, and promissory notes, and a mortgage, to a large amount in the whole, were found in her house: And Sir L. Shadwell, V.-C., held, that the niece (notwithstanding an annuity and a sum in gross were given to her by the Will) was entitled to the guineas and sovereigns, and also to the Bank of England notes, but not to the country bank or promissory notes, or the mortgage: His Honour observed, that Lord Hardwicke held that Bank of England notes passed under the bequest in *Lady Aylesbury's Case*, and that Lord Eldon, though he expressed a doubt as to the principle of that decision, did not expressly overrule it (*a*). Again, in *Hertford v. Lowther* (*b*), it was held by Lord Langdale, M. R., that a bequest of "all the goods and chattels, plate, linen, money at the bankers, or stock in the Monte de Milano, linen, horses, carriages, &c., I may die possessed of at Milan," did not pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearer to receive the interest and capital at a future time: inasmuch as the authorities determine, that, in such cases, *choses in action*, except Bank-notes, are not to be considered as having the locality of the places where the securities are. It was further held

(*a*) See also Lord Redesdale's judgment in *Fleming v. Brook*, 1 Scho. & Lefr. 319, and Lord Langdale's in *Hertford v. Lowther*, 7 Beav. 9. It will be observed that although there are a great many cases which lay down that *choses in action* cannot be referred to as of any particular locality, yet there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. See *Nisbett v. Murray*, 5 Ves. 149; *Arnold v. Arnold*, 2 M. & K. 365; *Tyrone v. Waterford*, 1 Do G. F. & J. 613, 625. It would seem that the latter cases go upon this, that there was in the Wills a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality. See per Cotton, L. J., in *Re Prater*, 37 C. D. 481, 486. It would seem that in construing such words respecting property described locally, the older cases do not give them a stereotyped meaning, but in every Will such words must receive light and colour from the context and circumstances of the testator. See per Bowen, L. J., *ibid.* 488. In this case the decision was largely based upon the ground that if the strictest and narrowest construction was put upon the words employed by the testator, "my property at Rothschild's Bank," the evidence showed that there was nothing at all at the bank to which these words could apply, and that such a construction would render the bequest insensible.

(*b*) 7 Beav. 1.

that such securities could not be considered as money or cash: And that, not having their locality at Milan, they did not pass under the words "&c. at Milan." This decision was affirmed on appeal to the Lord Chancellor (c).

"household goods:"

By the term "household goods," everything of a permanent nature, *i.e.*, articles of household use which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator, for his house, will pass to the legatee. But goods in his house, which are also goods in the way of his trade or business, will not pass: as where the testator, under a contract with government, was possessed of seven hundred beds, which he employed in entertaining sick and wounded seamen of the Royal Navy (d).

Plate will pass by this term (e), and it should seem that it is not of any consequence whether the plate was in common use or not, provided it were suitable to the situation and quality of the testator (f). But a gift of plate, &c. at a certain house will not pass plate at bankers (g).

But articles found in the house whose use is in their consumption, as malt, hops, or victuals, will not pass (h). Nor will guns and pistols pass, if used in riding and shooting of game, though they may in some sense be for defence of the house: but a clock in the house, if not fixed thereto, will be included in the words "household goods" (i).

"Goods and chattels, &c. in and about the house:"

Where the testator directed that all his plate, furniture, household goods, &c., &c., and other "*goods and chattels*," &c., &c., which should be *in and about his dwelling-house and out-houses* at A. at his death, should be enjoyed by such person as should be entitled to his estate under his son's marriage settlement; Lord Henley held that running horses were within the words (j).

In another case, the testator bequeathed to Lady S. all the residue of his *personal estate and effects*, except such part as

(c) See 7 Beav. Addenda et Corrigenda.

(d) *Pratt v. Jackson*, 2 P. Wms. 302; *S. C.*, in error, 1 Bro. P. C. 222, Toml. edit.

(e) *Lillcott v. Compton*, 2 Vern. 638; *Snelson v. Corbett*, 3 Atk. 370.

(f) *Kelly v. Powlett*, Ambl. 605, approved by Lord Alvanley in *Porter v. Tournay*, 3 Ves. 313. But the judgments in all the older cases rely on the plate being commonly used by the family.

(g) *Re Zouche*, [1919] 2 Ch. 178.

(h) *Slanning v. Style*, 3 P. Wms. 334.

(i) *Ibid.* See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; *post*, p. 939.

(j) *Gower v. Gower*, Ambl. 61.

should be *in and about his house* at C., which part he gave to his son, and directed the household furniture to go as heirlooms: In an iron chest at C., in which the steward kept the cash, was found a bond for arrears of rent, and the sum of 379*l.* 3*s.* 9*d.* in cash; Lord Loughborough decided that the bond and cash did not pass to the son (*k*).

A gift of the "contents" of a house has been held to include valuable ornamental fixtures (*l*).

The words "goods," "chattels," and other general terms, if coupled with other words of a limited signification, will be restrained to things *ejusdem generis*. Thus, where the testator bequeathed to his niece all his *goods, chattels*, household stuff, furniture, and *other things*, which should be in his house at A., it was decreed that cash found there at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before specified (*ll*).

"Goods" and other general words restricted by the context.

But where the bequest was of all the testatrix's plate, linen, household goods, and *other effects, money excepted*, Lord Eldon held, that although it was now settled that the words "other effects" mean, in general, effects *ejusdem generis*, yet in this case all the residuary estate (including leaseholds, stock, a promissory note, jewels, wearing apparel, a carriage, wines, &c.), except money, should pass: for the disposition, by reason of the express exception, must be taken to comprehend all that *she had not excluded*, which was money only (*m*).

Several other authorities may be found, which show that this rule is not of universal application (*n*).

(*k*) *Jones v. Sefton*, 4 Ves. 166.

(*l*) *Re Oppenheim*, 111 L. T. 937.

(*ll*) *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201, pl. 14. See for other instances, *Rawlings v. Jennings*, 13 Ves. 39, 46; *Collier v. Squire*, 3 Russ. Chan. Cas. 467; *Lamphier v. Despard*, 2 Dr. & Warr. 59. See also the judgment of Knight Bruce, V.-C., in *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 301—304; *Mullins v. Smith*, 1 Dr. & Sm. 204; *Clifford v. Arundell*, 1 De G. F. & J. 307; *In the goods of Ludlow*, 1 Sw. & Tr. 29; *Manton v. Tabois*, 30 O. D. 92. The expression, "&c." refers only to property *ejusdem generis*: *Newman v. Newman*, 26 Beav. 220; *Barnaby v. Tassell*, L. R. 11 Eq. 363. But see *Chapman v. Chapman*, 4 O. D. 800, where the residue was held to pass on the ground that "although the words which the testator used were not artistic, still they lead to only one possible conclusion, viz., that he intended to make his wife his universal residuary legatee," *per Jessel*, M. R., p. 801; cf. *King v. George*, 4 O. D. 435; 5 O. D. 627.

(*m*) *Hotham v. Sutton*, 15 Ves. 319. See accord. *Ivison v. Gassiot*, 3 De G. M. & G. 958. See also *Brooke v. Turner*, *ante*, p. 932.

(*n*) *Parker v. Marchant*, 1 Y. & O. Ch. C. 290, 301, 302; *Chapman v. Chapman*, 4 O. D. 800; and *post*, note (*r*). Most of the exceptions

In *Kendall v. Kendall* (o), it was holden by Lord Lyndhurst that a bequest of "all monies, goods, chattels, clothing, &c., my property, which may remain after paying my funeral expenses and debts," would pass the testator's interest in stock and money, inasmuch as the words "monies, goods, and chattels," would pass the whole personal estate, including stock, and the introduction of the words "clothing, &c.," was not for the purpose of qualifying the former terms, but resulted from the anxiety of the testator to enumerate every species of property which occurred to him (p).

So in *Arnold v. Arnold* (q), the testator by a Will executed in India, where he and his family then resided, bequeathed among other legacies, "to my dear wife 1,000*l.* sterling, also my wines and property in England:" Lord Cottenham held, that the widow took all the several descriptions of the testator's property which the Master had reported to have been in England at the time of his death; including cash and bills in the hands of his bankers and a reversionary interest in the three per cents. And his Lordship observed, that the mere enumeration of particular articles, followed by a general bequest, obviously did not of necessity restrict the general bequest; because a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted: The learned Judge added that he had been unable to discover any instance in which the word "property" had been confined to articles of the description before enumerated, unless where other expressions occurred from which it was clear that the word was not used in its ordinary sense.

Again, the word "effects," when inserted in a *residuary* disposition, will not be confined to articles *ejusdem generis* with

fall within another rule, viz., that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift: *West v. Lawday*, 11 H. L. C. 375, 384. See also *Dean v. Gibson*, L. R. 3 Eq. 713, 717; and cf. *Cambridge v. Rous*, 8 Ves. 12; *Re Bocket*, [1908] 1 Ch. 185.

(o) 4 Russ. Chanc. Cas. 360. See also *Fleming v. Burrows*, 1 Russ. Chanc. Cas. 276.

(p) See further *Gover v. Davis*, 29 Beav. 222; *Swinfen v. Swinfen*, *ibid.* 207; *Nugee v. Chapman*, *ibid.* 290; *Molyneux v. Rowe*, 8 De G. M. & G. 368; *In the goods of Goodyar*, 1 Sw. & Tr. 127; *King v. George*, 4 C. D. 435; 5 C. D. 627; *Re Fleetwood*, 15 C. D. 594.

(q) 2 M. & K. 365.

those preceding it: Thus where the bequest was of all the testator's sugar-house, &c., stock, with jewels, plate, household goods, furniture, and *all effects whatsoever*, the general residue passed (r).

An instance of the restraint of general words by the context may be adduced in the doctrine, that, where the legatee has a *money legacy*, this circumstance is to be considered as clearly manifesting an intention to confine the import of the word "goods" or the like, so as to prevent it passing ready money (s).

"Household furniture:" By this expression, all personal chattels will pass that may contribute to the use or convenience of the householder, or the ornament of the house (t), as plate, linen, china, both useful and ornamental, and pictures (u): But goods or plate in the possession of the testator in the way of his trade, will not pass (x): nor books (y): nor wines (z). As a general rule a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator (a).

"Household furniture."

In *Re Seton-Smith* (b), where the testator, an innkeeper,

(r) *Campbell v. Prescott*, 15 Ves. 500; *Mitchell v. Mitchell*, 5 Madd. 69. See also *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290; *Fisher v. Hepburn*, 14 Beav. 626; *Re Kendall's Trust*, 14 Beav. 608; *Everall v. Browne*, 1 Sm. & G. 368; *Dean v. Gibson*, L. R. 3 Eq. 713; *In the goods of Sharman*, L. R. 1 P. & D. 661; *Hodgson v. Jex*, 2 O. D. 122. So copyholds were held to pass by the words "money, property, and effects" aided by the context: *Streatfield v. Cooper*, 27 Beav. 338.

(s) *Roberts v. Kuffin*, 2 Atk. 113. See *Brooke v. Turner*, ante, p. 932.

(t) By Sir T. Clarke, M. R., in *Kelly v. Powlett*, Ambl. 610. See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; *Tempest v. Tempest*, 2 Kay & J. 635; *Field v. Peckett*, 29 Beav. 573.

(u) *Kelly v. Powlett*, Ambl. 611. See ante, p. 934, as to plate. Whether a bust will pass under the words "household goods, furniture, fixtures," *quære*: see *Willis v. Curteis*, 1 Beav. 189.

(x) *Le Farrant v. Spencer*, 1 Ves. Sen. 97; *Manning v. Purcell*, 7 De G. M. & G. 55.

(y) *Bridgman v. Doe*, 3 Atk. 202; *Kelly v. Powlett*, Ambl. 611; *Porter v. Tournay*, 3 Ves. 311. But books were held to pass upon an apparent intention that the testator's house should not be dismantled, but kept as a residence for his widow and children: *Ouseley v. Anstruther*, 10 Beav. 462.

(z) *Porter v. Tournay*, 3 Ves. 311.

(a) *Finney v. Grice*, 10 C. D. 13. There may, however, be special circumstances in particular cases from which the intention of the testator to pass the fixtures under the word "furniture" may be gathered, as in *Paton v. Sheppard*, 10 Sim. 186. In *Slanning v. Style*, 3 P. Wms. 336, Lord Talbot held that the clock of the house if not fixed to it, was included in a bequest of household goods.

(b) [1902] 1 Ch. 717.

carrying on business at, and the yearly tenant of the Roebuck Hotel, bequeathed "all the furniture and other personal effects belonging to me and which at the date of my death are at the Roebuck Hotel," to W., and gave the residue of his personal estate to other persons; it was held that W. was entitled to the furniture, linen, plate, glass, china, and other effects at the hotel, whether used for domestic purposes or for the purposes of the hotel business; but not to the trade or tenant's fixtures.

In *Cremorne v. Antrobus* (c), a testator by his Will bequeathed his leasehold dwelling-house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also, all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith: By a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging." It was held by Lord Lyndhurst, that pictures placed in the house as ornamental furniture, and the plate and linen, passed by the codicil: but that the codicil had no operation on the disposition made by the Will of the books, the gold and silver coins, trinkets, and things of that nature.

"Fixed
furniture."

In *Birch v. Dawson* (d), A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures, and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in the messuage, not being comprehended under the preceding terms, *fixtures and fixed furniture*, to V. absolutely: There were in the messuage, looking-glasses, standing on chimney-pieces, and nailed to the wall, and a bookcase standing on (but not fastened to) brackets, and

(c) 5 Russ. 312.

(d) 2 Adol. & Ell. 37. In *Leigh v. Taylor*, [1902] A. C. 157, valuable tapestries affixed by a tenant for life to the walls of a house, and removable without doing any structural injury, were held not to pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life. See also *ante*, p. 558 *et seq.*, as to what are fixtures.

screwed to the wall: and the Court of King's Bench held that V. took only a life interest in these, because they came within the term "fixed furniture."

In *Cole v. Fitzgerald* (e), it was held by Sir John Leach, V.-C., that the words "household furniture and other household effects, of or belonging to the testator's dwelling-house and premises at his decease," comprised all property in the house or on the premises intended for use or consumption therein, or for ornament thereof; and that it included pistols, apparatus for turning, models, pictures, an organ, a parrot, books (f), wine and liquors; but not a pony, cow, or fowling-pieces, unless it was proved they were kept for defence of the house: If a haystack was only for use, it would pass; if for sale, it would not: And this decision was afterwards affirmed by Lord Lyndhurst (g). A motor car does not pass under a gift of carriages, but passes under household effects or articles of household use (h).

In *Fitzgerald v. Field* (i), the testator directed that his household furniture, &c., and utensils in and about his mansion-house at H., should go with the mansion-house, and that for that purpose his trustees should make an inventory of the furniture, &c., and utensils, which should be found in and about his mansion-house and premises at the time of his decease: It was holden that those words did not pass farming utensils on lands at H. occupied by the testator along with the mansion-house.

A bequest of business and plant has been held to include the house, bank balance and book debts (j). "Business and plant:"

"Stock on farm:" By this term, not only all *moveable* property upon or belonging to the farm will pass; but also, it would seem, growing crops (k); and in one case, from the context, it was held to include stock in the malt trade (l). "Stock on farm:"

(e) 1 Sim. & Stu. 189. See *Re Howe*, [1908] W. N. 223; *Re Ashburnham*, 107 L. T. 601.

(f) So books will pass under a bequest of "other articles of domestic use and enjoyment:" *Cornwall v. Cornwall*, 12 Sim. 303; but see *post*, p. 953.

(g) 3 Russ. Chanc. Cas. 301. According to the latter reporter, the Vice-Chancellor declared that the parrot did not pass.

(h) *Re White*, [1916] 1 Ch. 172; *Re Fortlage*, [1916] W. N. 214.

(i) 1 Russ. Chanc. Cas. 427.

(j) *Re Hawkins*, 109 L. T. 969.

(k) *Cox v. Godsalve*, 6 East, 604, note; *West v. Moore*, 8 East, 339; *Rudge v. Winnall*, 12 Beav. 357; *Re Roose*, 17 O. D. 696.

(l) *Brooksbank v. Wentworth*, 3 Atk. 64. As to what will pass by

In *Steward v. Cotton* (m), a testator devised a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm: and he bequeathed the residue of his estate and effects, real and personal, to his wife absolutely: The testator died in July: The wife, having severed the growing crops and stacked them on the farm, died in the following September, when the remainderman entered and took possession both of the farm and of the crops which had been so severed: And it was held, that the personal representative of the wife was entitled to those crops.

“Utensils:” “Utensils.” Under this term plate or jewels will not pass, according to the opinion of the Judges, in *Dame Latimer’s Case* (n).

“Money:” “Moneys.” Where a testator gives to one person “all his moneys in hand,” and to another “all his moneys out on securities,” the balance at his banker’s will pass as money in hand (o). Under a bequest of all the testator’s “money” in

“Live and dead stock,” see *Porter v. Tournay*, 3 Ves. 313; *Randall v. Russell*, 3 Meriv. 190. As to what passes by a bequest of “Stock-in-trade,” see *Elliott v. Elliott*, 9 M. & W. 23. As to a gift of “Plant and goodwill in my business in — street,” see *Blake v. Shaw*, Johns. 732; *Re Hawkins*, *supra*. As to a gift of “Farming-stock and effects,” see *Harvey v. Harvey*, 32 Beav. 441.

(m) 5 Russ. 17, in *notis*, coram Willes, Justice, and Masters Holford, Browning, and Orde.

(n) Dyer, 59, pl. 15.

(o) *Vaisey v. Reynolds*, 5 Russ. 12. See also accord. *Parker v. Marchant*, 1 Y. & Coll. Ch. C. 290, affirmed 1 Phil. Ch. C. 356. See also *Re Powell’s Trusts*, Johns. 49. So under a bequest of “all my moneys,” money due on deposit notes of the testator’s bankers as well as on the balance of his current account, and also money in the hands of a stakeholder on a bet, were held to pass: *Manning v. Purcell*, 1 Sm. & G. 284. This decision, however, was reversed on appeal as far as concerned the money in the hands of the stakeholder: 24 L. J. Ch. 522. “Moneys owing to me” will pass money on deposit at a bank: *Re Derbyshire*, [1906] 1 Ch. 135, but such money will not pass under “pecuniary investments:” *Re Price*, [1905] 2 Ch. 55, nor under “ready money,” if notice of withdrawal is required: *Re Wheeler*, [1904] 2 Ch. 66. Consols purchased with cash withdrawn from the Post Office will not pass under any money at the Post Office: *Re Mann*, [1912] 1 Ch. 388. The expression “cash or moneys so called,” was held not to include a promissory note payable to the testator or order, or Long Annuities, or Columbian bonds: *Beales v. Crisford*, 13 Sim. 592. See also *Smith v. Butler*, 1 Jones & Lat. 692; *Re Windsor*, 108 L. T. 947. In *May v. Grave*, 3 De G. & Sm. 462, Knight Bruce, V.-C., held that unreceived dividends did not pass under the words “ready money,” *cf. Fryer v. Ranken*, 11 Sim. 55. See further, as to what will pass as “ready-money,” *Cooke v. Wagster*, 1

his house at A., bank-notes and ready money will alone pass, although he may leave it in mortgages, bonds, or receipts for government annuities (p). However, where the testator bequeathed all his *money* in the Bank of England, and never had any cash in the Bank, but was entitled to some three per cents. and five per cents. Bank annuities, Sir Wm. Grant, M. R., held that the stock passed (q).

But though, upon the whole context of the Will, stock may pass by the term "money" (r), yet *money* does not, by the force of the word, include *stock* (s).

In *Hastings v. Hane* (t), a testator, after giving specific and pecuniary legacies, willed that A. and B. should divide, equally, any *monies* which might remain to his account after payment of his debts and pecuniary legacies: The testator, at the date of his Will and at his death, had money accounts subsisting between him and his bankers, and other persons: and Sir L. Shadwell, V.-C., held, that the bequest did not pass his residuary

Sm. & G. 296; *Re Powell's Trusts*, Johns. 49; *Wylie v. Wylie*, 1 D. F. & J. 410; *Re Rodmell*, 108 L. T. 184; *Re Wheeler*, *supra*.

(p) *Downing v. Townsend*, Ambl. 280. See *ante*, p. 932.

(q) *Gallini v. Noble*, 3 Meriv. 691; cf. *Re Mann*, [1912] 1 Ch. 388, *supra*. See *Benson v. Whittam*, 2 Sim. 493, as to a bequest of "money in the hands of any banker," and see *Howell v. Gayler*, 5 Beav. 157. "Money at the bank" includes money on deposit account withdrawable on notice: *Re Glendinning*, 88 L. J. Ch. 87.

(r) See *Legge v. Asgill*, 1 Turn. & Russ. 265, note, as cited by Sir J. Leach, M. R., in *Kendall v. Kendall*, 4 Russ. Chanc. Cas. 369; *Waite v. Combes*, 5 De G. & Sm. 676; *Chapman v. Reynolds*, 28 Beav. 221; *Re Woolley*, [1918] 1 Ch. 33.

(s) *Omanney v. Butcher*, 1 Turn. & Russ. 272, by Lord Eldon; *Gosden v. Dotterill*, 1 M. & K. 56; *Willis v. Plaskett*, 4 Beav. 208; *Lowe v. Thomas*, Kay, 369. Affirmed on appeal, 5 De G. M. & G. 315; *Cowling v. Cowling*, 26 Beav. 448; *Re Gliddon*, [1917] 1 Ch. 174. So it was held by Lord Langdale, M. R., in *Douglas v. Congreve*, 1 Keen, 410, that a legacy of a sum of stock did not fall within the description of "pecuniary legacies." Where a testator gave to his wife any money that he might die possessed of, or which might be due and owing to him at the time of his decease, it was held that the moneys receivable under a policy of assurance on his own life, to which the testator was entitled, passed under the above bequest: *Petty v. Willson*, L. R. 4 Ch. 574. But where a testator made a testamentary gift "of any money of which I may die possessed," it was held by Lord Selborne, L. C., that these words included cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity or of interest payable to her, which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal: *Byrom v. Brandreth*, L. R. 16 Eq. 475.

(t) 6 Sim. 67.

estate, but only the balances due on those accounts, subject to the debts and legacies.

The result of the cases seems to be, that, although a simple bequest of "money" will not of itself pass stock, yet the word "money" may be so used in a Will, as from the whole context to show that the testator meant it to pass stock and other personal estate not properly so called, or all the personal estate; and when this intention can be clearly collected, the Court will act upon it (u).

But it must be observed that the rule of construction is that the word "money" does not extend beyond what is literally "money," unless the context requires it (v).

"Money in the funds:"

"Money in the Funds." In a case where a testator directed all his property, *except ready money, or money in the funds*, to be converted into money, and the clear moneys arising from such conversion to be invested in the names of the executors in 3*l.* per cent. Consols, or "other government securities" in England; it was held by Knight Bruce, V.-C., that Greek bonds, though guaranteed by this country, were not comprehended in the word "funds;" and that they were a proper subject of conversion under the terms of the Will (x). But a bequest of "all the

(u) *In the goods of Hand*, 7 Notes of Cas. 60; *Dowson v. Gaskoin*, 2 Keen, 14; *Rogers v. Thomas*, 2 Keen, 8; *Glendening v. Glendening*, 9 Beav. 324; *Prichard v. Prichard*, L. R. 11 Eq. 232; *Re Pringle*, 17 C. D. 819; *In the goods of White*, 7 P. D. 65; *Re Cadogan*, 25 C. D. 154; *Re Smith, Henderson-Roe v. Hitchens*, 42 C. D. 302; *In the goods of Bramley*, [1902] P. 106. See also *Waite v. Combes*, 5 De G. & Sm. 676; *Cooke v. Wagster*, 2 Sm. & G. 296; *Langdale v. Whitfield*, 4 Kay & J. 426; *Knight v. Knight*, 2 Giff. 616; *Boardman v. Stanley*, 7 Ir. R. Eq. 342; *Re Woolley*, [1918] 1 Ch. 33. In *Wateley v. Spooner*, 3 Kay & J. 542, the words "sums of money" were held to comprise personal estate generally. See also *Stocks v. Barré*, Johns. 54; *Re Skillen*, [1916] 1 Ch. 518. A contrary construction was adopted on the context in *Lowe v. Thomas*, Kay, 369; 5 De G. M. & G. 315; *Re Gliddon*, [1917] 1 Ch. 174. In *Re Egan*, [1899] 1 Ch. 688, a gift of "any money . . . in my possession at my death" was held to pass a reversionary interest in personality; *Re Woolley*, [1915] 1 Ch. 33.

(v) *Montague v. Sandwich*, 33 Beav. 324; *Larner v. Larner*, 3 Drew. 704; *Williams v. Williams*, 8 C. D. 789; *In the goods of Aston*, 6 P. D. 203; *Re Sutton*, 28 C. D. 464. A bequest of "all moneys, both in the house and out of it," was held not to pass the residue: *Collins v. Collins*, L. R. 12 Eq. 455. In *Langdale v. Whitfield*, 4 Kay & J. 426, Wood, V.-C., says, "The authorities have clearly settled that *primâ facie* and in the absence of anything in the Will to indicate a different intention, the word 'moneys' will be confined to ready money actually in hand. A different intention may be gathered from the words of the Will, and where that is the case, effect will be given to it." Cited by Baggallay, L. J., in *Williams v. Williams (ubi supra)*, at p. 793; *Re Gliddon*, [1917] 1 Ch. 174.

(x) *Burnie v. Getting*, 2 Coll. 324. In *Ellis v. Eden*, 23 Beav. 543,

funded property in my name" was held to pass Irish Bank stock, and Irish $3\frac{1}{4}$ per cents. belonging to the testator and standing in his name jointly with three others (*y*). Where, however, the testator has stock which accurately answers the description in his Will, though different in amount, the description will not be extended to stock of a different species (*z*). Under a bequest of "the dividends and interest of all my money in the funds," unreceived dividends will not pass (*a*). Colonial bonds will not pass under a bequest of "foreign" bonds (*b*). Colonial bonds.

Stock in a Railway Company will pass under the words "shares in a Railway Company," unless there is any indication in the Will to the contrary (*c*). A bequest of all a testator's "shares" in a public company was held not to pass debenture stock where the testator had both shares and debenture stock about the date of the Will (*d*); but if there is nothing except debenture stock on which the gift can operate, it will pass under a gift of shares (*e*). A gift of "debenture stock or shares" has been held to pass debentures (*f*). Shares.

"Securities for money." If there be nothing in the Will to control the force of this expression, stock in the funds will pass by it (*g*): but it seems doubtful whether it will include Bank stock, that being property wherein the owner is interested as a "Securities for money:"

the words "stock in the foreign funds" were held, on the terms of the Will, to comprise all foreign securities for which the faith of the foreign country was pledged.

(*y*) *Mangin v. Mangin*, 16 Beav. 300. A sum in the long annuities was held to pass under a bequest of "my present funded stock or government securities," the testator having no other funded property: *Grosvenor v. Durston*, 25 Beav. 97. But where a testatrix was possessed of Consols, reduced annuities and bank stock, it was held that bank stock would not pass under a bequest of the "whole of my fortune now standing in the funds": *Grainger v. Slingsby*, 8 De G. M. & G. 285; *sub nom. Slingsby v. Grainger*, 7 H. L. C. 273.

(*z*) *Gilliat v. Gilliat*, 28 Beav. 481.

(*a*) *Shore v. Weekly*, 3 De G. & Sm. 467.

(*b*) *Hull v. Hill*, 4 C. D. 97.

(*c*) *Morrice v. Aylmer*, L. R. 7 H. L. 717; *Re Willis*, [1911] 2 Ch. 563. Where, however, a testator, having certain debentures at the date of his Will, gave "all my debentures" upon certain trusts, and subsequently in exercise of an option converted them into debenture stock of the same company, it was held that the debenture stock did not pass: *Re Lane*, 14 C. D. 856; but see *Re Herring*, [1908] 2 Ch. 493.

(*d*) *Re Bodman*, [1891] 3 Ch. 135.

(*e*) *Re Weeding*, [1895] 2 Ch. 364; *Re Connolly*, 110 L. T. 688; and see *post*, p. 954, as to mistake in the description of a legacy.

(*f*) *Re Nottage*, [1895] 2 Ch. 657.

(*g*) *Bescoby v. Pack*, 1 Sim. & Stu. 500.

partner in a public trading company (*h*). Nor will it include money placed at a banker's on deposit notes (*i*). Canal shares will not pass under a bequest of property vested "in bonds or securities" (*j*).

In *Re Rayner* (*k*), Farwell, J., said that the word "securities" had the well-defined primary meaning of "money secured on property." On appeal, Vaughan Williams, L. J., observed that the word is not a term of art, but only a word of description: it is a commercial word which will vary with the history of commerce. And referring to the case of *Ogle v. Knipe* (*l*), his Lordship said: "The decision certainly did not impress a 'technical meaning' on the word 'securities,' or limit for ever the meaning of the word 'securities' to its narrow archaic meaning" (*m*). However, Romer, L. J., in his judgment, said: "In the absence of any context or admissible evidence from which it can be gathered that the word 'securities' has another meaning, I agree with Farwell, J., that it must be taken in a Will to have the meaning stated by him; and that the expressions 'securities for money' and 'investments of money upon securities,' and even this expression 'investment of money in securities,' would accordingly, in the absence of anything sufficient to negative that view, be held to apply only to securities in the sense above stated." The Court, however, held, in the case under consideration, that the context was sufficient to show that "securities" meant "investments" (*n*).

It has been held that an I O U given to the testator for goods sold by him was not a "security for money," within the meaning of a bequest of "all my money and securities for money" (*o*). Nor will such a gift include a mere debt due to

(*h*) *Bescoby v. Pack*, 1 Sim. & Stu. 500. See *Dicks v. Lambert*, 4 Ves. 725; *Ogle v. Knipe*, L. R. 8 Eq. 434.

(*i*) *Hopkins v. Abbott*, L. R. 19 Eq. 222. In *Mayne v. Mayne*, [1897] 1 Ir. R. 324, a gift of "ready money in bank" was held to include money on deposit receipt, which could be withdrawn without previous notice to the bank; otherwise if previous notice was necessary: *Re Wheeler*, [1904] 2 Ch. 66.

(*j*) *Hudleston v. Gouldsbury*, 10 Beav. 547.

(*k*) [1904] 1 Ch. 176. In this case the question of the admissibility of extrinsic evidence to ascertain the true sense and meaning of doubtful expressions in a Will was discussed and considered.

(*l*) L. R. 8 Eq. 434.

(*m*) Cf. observation of Lord Halsbury, L. C., in *Higgins v. Dawson*, [1902] A. C. at p. 5.

(*n*) *Re Gent and Eason*, [1905] 1 Ch. 336.

(*o*) *Barry v. Harding*, 1 Jones & Lat. 475. In this case, Sugden, C. of Ireland, said that a bill of exchange or promissory note is a security for money, in the legal and proper sense of the words.

the testator (*p*). A bequest of "all securities for money" has been held to include money due to a testator in respect of which he had a vendor's lien for unpaid purchase money (*q*).

A bequest of "securities standing in my name" does not include bonds to bearer kept at a bank in an envelope bearing the testator's name (*r*).

In *Galliers v. Moss* (*s*), the testator bequeathed to his executors, by a residuary clause, all his stock in trade, ready money, *securities for money*, personal estate, and effects of what nature and kind soever, in trust that they or the survivor, or the heirs, executors, administrators, &c. of such survivor, should sell the same, and invest the produce in the purchase of freehold estate: The Court of K. B. was of opinion, that the legal estate in lands, of which the testator was seised as mortgagee, did not pass to the executors by the words "securities for money." But in the previous case of *Renvoise v. Cooper* (*t*), Sir J. Leach, V.-C., held, that a residuary clause of personalty, including the words "mortgages and *other securities for money*," passed the legal fee. And on a subsequent occasion, in *Ex parte Barber* (*u*), it was held by Sir L. Shadwell, V.-C., that a devise of all the testator's freehold estates, and all his farming stock, ready money, bills, bonds, notes and other *securities for money*, and all the residue of his personal estate, to trustees, *their heirs*, executors, &c., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, would pass a mortgage in fee. Again, in *Mather v. Thomas* (*v*), it was held by the same learned Judge, in conformity with a certificate by the Judges of the C. P. on a case sent by his Honour for their opinion, that a devise of all messuages, buildings, chattels real, ready money, *securities for money*, debts owing, and personal estate, save what were before otherwise disposed of, to trustees and *their heirs*, in trust to pay the rents and profits to C. for life, and after his decease to divide such residue among the children of J. C., would pass lands vested in the devisor as mortgagee in fee. It will be observed that in these two cases the word "*heirs*" is used in the bequest:

Whether the legal estate of the mortgagee passes under a gift of "securities for money."

(*p*) *Re Mason's Will*, 34 L. J. Ch. 603.

(*q*) *Callow v. Callow*, 42 C. D. 550.

(*r*) *Re Mayne*, [1914] 2 Ch. 115.

(*s*) 9 B. & C. 267.

(*t*) 6 Madd. 371.

(*u*) 5 Sim. 451.

(*v*) 6 Sim. 115; 10 Bing. 44; 3 Moore, 684.

But it would seem that it would be laying too much stress upon that word to say that it made the difference between them and *Galliers v. Moss*, which was treated by Parker, V.-C., in *Re King's Mortgage (w)*, as overruled by the subsequent decisions; and that learned Judge accordingly held, that by a gift of "securities for money" the legal estate of the mortgagee passed: And it was held in *Doe v. Bennett (x)* to pass under a bequest of all "monies upon mortgages."

A gift of income or produce without limitation vests the capital.

Where the "interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him (*y*), *without any limitation as to continuance*, the principal will be regarded as bequeathed also (*z*): Thus an indefinite gift of the dividends gives the absolute property of the stock (*a*). But the rule, though it applies to shares in a limited company, does not apply to a share in a partnership (*b*).

(*w*) 5 De G. & Sm. 644. See accord. *Knight v. Robinson*, 2 Kay & J. 503; *Rippen v. Priest*, 13 C. B. N. S. 308. See also *Re Stevens' Will*, L. R. 6 Eq. 597. Trust and mortgage estates will pass under general words in a Will, unless something is found in the Will showing a contrary intention. A charge of debts, or of debts and legacies, or of legacies only, shows a contrary intention: *Re Bellis's Trusts*, 5 C. D. 504; and cf. *Re Packman and Moss*, 1 C. D. 214; *Re Brown and Sibley's Contract*, 3 C. D. 156; *Re Smith's Estate*, 4 C. D. 70.

(*x*) 6 Exch. 892.

(*y*) A bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use: *Adamson v. Armitage*, 19 Ves. 416. See also *Humphrey v. Humphrey*, 1 Sim. N. S. 536.

(*z*) *Elton v. Sheppard*, 1 Bro. C. C. 532; *Philipps v. Chamberlaine*, 4 Ves. 51; *Rawlings v. Jennings*, 13 Ves. 39; *Adamson v. Armitage*, 19 Ves. 418; *S. C.*, Cooper, 283, 284; *Stretch v. Watkins*, 1 Madd. 253; *Clough v. Wynne*, 2 Madd. 188; *Haig v. Swiney*, 1 Sim. & Stu. 490; *Hawkins v. Hawkins*, 7 Sim. 178; *Clarke v. Gould*, *ibid.* 197; *Humphrey v. Humphrey*, 1 Sim. N. S. 536; *Jenings v. Baily*, 17 Beav. 118; but see *Cooke v. Bowler*, 2 Keen, 54; *McDonald v. Bryce*, *ibid.* 517. See also *Blann v. Bell*, 5 De G. & Sm. 658, 663, where Parker, V.-C., said that the rule which gives an absolute interest in the funds, when there is a general gift of the income, is not a very strong one; and that in all such cases the Court is obliged to find out the meaning from the context. See likewise *Wetherell v. Wetherell*, 4 Giff. 51; 1 De G. J. & S. 134; *Page v. Young*, L. R. 19 Eq. 501. Where the entire fund or the entire interest of a fund is given for a particular purpose which fails, the Court holds the donee entitled to the whole fund, treating the purpose merely as the motive for the gift: *Secus*, where the gift is of the whole or any part of the fund: *Re Sanderson's Trusts*, 3 Kay & J. 497; *Re Andrew's Trust*, [1905] 2 Ch. 48.

(*a*) *Page v. Leapingwell*, 18 Ves. 463; *Haig v. Swiney*, 1 Sim. & Stu. 487, 490; *Southouse v. Bate*, 16 Beav. 132. So also a bequest of rent will pass the land itself: *Ashton v. Adamson*, 1 Dr. & W. 198.

(*b*) *Re Lawes-Witteuronge*, [1915] 1 Ch. 408.

There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptance of the term used, if it should be said that a testator had left another an annuity of 100*l.* *per annum*, no doubt would occur of the gift being an annuity for the life of the donee (*c*). Accordingly it is perfectly settled, that a simple gift of an annuity to A. does not give an annuity beyond the life of A. (*d*). So it was decided by Knight Bruce, V.-C., in *Wilson v. Maddison* (*e*), that a bequest of 30*l.* a year "from the interest of my funded property in the Bank of England," did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of 30*l.* upon the funded property for the life of the legatee: His Honor observing that what the testator gave was an annuity of 30*l.* a year charged on the stock; not an annuity of 30*l.* a year, part of the stock.

Still where, in effect, the bequest is a gift of property which will produce the amount of the annuity, or, in other words, where the Will dedicates the *corpus* of a fund to the purchase of the annuity, it is a gift in perpetuity (*f*). So, where the Will deals with the annuity as being in existence and operative beyond the period of the life of him who is first to enjoy it, and no other period can be fixed for such further duration short of making it perpetual (*g*), the annuity must be considered as given in perpetuity; that is to say, it is a bequest of so much property as will produce the income which the testator prescribes as the amount of the gift he intends for the legatee. And though if an annuity be given to one for life, and after his death to another simply, the latter does not necessarily take an absolute interest in the annuity, yet there may be other

(*c*) *Blewitt v. Roberts*, 1 Cr. & Ph. 274, 280.

(*d*) *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 583, by Lord St. Leonards; *Blewitt v. Roberts*, 1 Cr. & Ph. 274; *Potter v. Baker*, 13 Beav. 273; *Re Groves's Trust*, 1 Giff. 74; *Blight v. Hartnoll*, 19 C. D. 294, 296, *per* Fry, J.; *Re Morgan*, [1893] 3 Ch. 222.

(*e*) 2 Y. & Coll. Ch. O. 372.

(*f*) *Stokes v. Heron*, 12 Cl. & F. 161; *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 577, 584; *Hill v. Ratley*, 2 Johns. & H. 634; *Hedges v. Harpur*, 3 De G. & J. 129; *Ross v. Borer*, 2 Johns. & H. 469; *Bent v. Cullen*, L. R. 6 Ch. 235; *Hicks v. Ross*, L. R. 14 Eq. 141; *Evans v. Walker*, 3 C. D. 211. See, however, the observations on *Bent v. Cullen*, *ubi supra*, in *Re Morgan*, *ubi supra*.

(*g*) *Stokes v. Heron*, 12 Cl. & F. 194; *Robinson v. Hunt*, 4 Beav. 451.

circumstances affecting the construction which are sufficient to show an intention to give the annuity indefinitely (*h*). A gift of an annuity for a term or *pur autre vie* is a gift to the annuitant *and his personal representatives* during the term, or the life of the *cestui que vie*, and is not limited to the life of the annuitant (*i*). And a gift of the income to arise from a fund during the life of A. to B. for his maintenance is an absolute gift to B. his executors and administrators during the life of A., and is not confined to the joint lives of A. and B. (*j*).

As already stated, as a general rule, there can be no doubt that the gift of an annuity to A. is a gift during the life of A. and nothing more: on the other hand, where a testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, the annuity is presumed to be a perpetual annuity, and the bequest of the annuity is equivalent to a bequest of so much property as will produce the annuity spoken of (*k*). But it does not seem to be true (notwithstanding the decision in *Evans v. Walker* (*l*)), that a gift of an annuity beyond the life of the first taker is of itself a sufficient indication that it should be perpetual (*m*). To make an annuity created by Will perpetual there must be express words in the Will so describing it, or the testator must by some language in the Will indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property from the interest or profits of which the annuity is to be paid. When this is done, the annuity when mentioned in the Will represents the *corpus* so appropriated and, the *corpus* passing by the bequest of the annuity, the annuity may be said to be perpetual (*n*). Neither, however, does it seem

(*h*) *Potter v. Baker*, 13 Beav. 273; 15 Beav. 489. See further on this subject, *Pawson v. Pawson*, 19 Beav. 146.

(*i*) *Re Ord*, 9 C. D. 667; 12 C. D. 22; *Re Cannon*, [1915] W. N. 344.

(*j*) *Attwood v. Alford*, L. R. 2 Eq. 479.

(*k*) *Blight v. Hartnoll*, 19 C. D. 294.

(*l*) 3 C. D. 211.

(*m*) *Blewitt v. Roberts*, 10 Sim. 491; 1 Cr. & Ph. 274; *Lett v. Randall*, 2 De G. F. & J. 388; *Blight v. Hartnoll* (*ubi supra*), at p. 297. It will be observed that the fact of the first interest being expressly limited to life does not afford an argument that the second interest is not so limited on the principle of the maxim "*expressio unius*," &c., because the duration of the life of the first taker is expressed, not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second. See *Blight v. Hartnoll*, *ubi supra*, per Fry, L. J., p. 297.

(*n*) *Lett v. Randall*, 2 De G. F. & J. 388, 392.

to be true that an appropriation of property to meet an annuity is a sufficient indication (o). It is plain that a distinction between an annuity for life with a remainder over, charged on a fund, and a gift of part of the produce of a fund for life with a remainder over is very fine, and yet it would seem that in the former case the first and second taker were held alike to take mere life estates in the annuity while in the latter case the second taker was held to take a perpetual interest equivalent to the *corpus* of the fund. The distinction between these cases does not seem, having regard to the observations of Lord Hatherley in *Bent v. Cullen* (p), to turn on the use of the word "annuity," nor on the fact that the annuity may happen to be charged on part of the income of a fund as was the case in *Blight v. Hartnoll* (q). The distinction would rather seem to be based on what appears from the words of the Will to be the subject-matter of the bequest. If, primarily, the testator would seem to be dealing with an annuity then the mere incident that he charges the annuity on a fund is not sufficient to give a second taker the *corpus* or more than a life estate, whereas if the testator is dealing primarily with a gift of the produce or a part of the produce of a fund the mere incident that he gives the first taker a life estate is not sufficient to prevent the second taker taking the *corpus* of the fund as the taker of an unlimited gift of income.

A bequest of an annuity to several persons during their lives without words of survivorship is a bequest to each of them of a separate annuity and upon the death of each his separate annuity ceases (r).

It may be here mentioned, that it is established by several cases (s), that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or before the Will is proved, or even before the fund is available, as during the life of the person after whose death the investment is to be made (t), yet still it

Bequest to
purchase
annuity for
life of legatee.

(o) *Innes v. Mitchell*, 9 Ves. 212.

(p) L. R. 6 Ch. 235; but see observations on this case by the Court of Appeal in *Re Morgan*, [1893] 3 Ch. 222.

(q) 19 C. D. 294.

(r) *Re Evans*, 77 L. J. Ch. 583.

(s) *Yates v. Compton*, 2 P. Wms. 309; *Barnes v. Rowley*, 3 Ves. 482; *Palmer v. Craufurd*, 3 Swanst. 305; *Re Mabbett*, [1891] 1 Ch. 707; *Re Robbins*, [1907] 2 Ch. 8.

(t) *Bayley v. Bishop*, 9 Ves. 6. In the case of *Day v. Day*, 1 Drewr. 569, Sir R. Kindersley, V.-C., seems to have decided that the rule in

is a vested legacy, from the death of the testator, and the sum will belong to the personal representatives of the legatee: And it is further established, that the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum (*u*), or to have it laid out in an annuity (*v*). A direction that the annuitant shall not be entitled to have the value of his annuity, and that, if he should sell his annuity, the same should cease and form part of the testator's residuary estate, is inconsistent with the gift itself, and the annuitant is absolutely entitled (*x*).

"Debts."

"Debts." Under a bequest of "whatever debts may be due to me at the time of my death," it has been held, that a bill of exchange, drawn in the testator's favour, and delivered by him to his banker, and a cash balance in his banker's hands passed to the legatee (*y*).

the text applied, although the bequest of the annuity was coupled not only with the words intended to restrain anticipation, but also with a gift over in case the legatee should assign, encumber, or anticipate, or take the benefit of any Act for the relief of insolvent debtors; but this decision has not been followed: *Re Draper*, 57 L. J. Ch. 942; *Power v. Hayne*, L. R. 8 Eq. 262. Where, however, the money is bequeathed to trustees to be invested in the purchase of an annuity to be paid to a married woman with restraint on anticipation, the rule in the text would seem to apply: *Woodmeston v. Walker*, 2 Russ. & M. 197. But see *Re Ross*, [1900] 1 Ch. 162, where, in the final distribution of an insufficient estate, the dividend on the capital value of an annuity bequeathed to a married woman with restraint on anticipation was ordered to be laid out in the purchase of an annuity for her; since, owing to the restraint, North, J., did not see his way to direct payment to her. Before, however, the annuity was purchased she died, and it was held the capital belonged to her estate.

(*u*) *Stokes v. Cheek*, 28 Beav. 620, where an annuitant, entitled to a perpetual annuity, adequately secured, is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as at the price of the day will purchase $2\frac{1}{2}$ per cent. Government Stock sufficient to produce the annuity, excluding any charge for brokerage: *Hicks v. Ross*, [1891] 3 Ch. 499; *Re Robbins*, [1907] 2 Ch. 8; *Re Brunning*, [1909] 1 Ch. 276.

(*v*) *Dawson v. Hearn*, 1 Russ. & M. 606, 608; *Kerr v. Middlesea Hospital*, 2 D. M. & G. 584, per Lord St. Leonards; *Ford v. Batley*, 17 Beav. 303; *Stokes v. Cheek*, 28 Beav. 620; *Re Robbins*, [1907] 2 Ch. 8; *Re Castle*, *infra*. But where one of the liabilities of the testator's estate is a life annuity, the annuitant is not, in the administration of the estate, entitled to the value of the annuity as a gross sum: *Yates v. Yates*, 28 Beav. 637. As to whether, in the construction of the word "legacies" in a Will, annuities bequeathed are to be included, see *Cornfield v. Wyndham*, 2 Coll. 184; *Bromley v. Wright*, 7 Hare, 334; *Heath v. Weston*, 3 De G. M. & G. 601; *Gaskin v. Rogers*, L. R. 2 Eq. 284. As to the course an executor should follow where he is directed to purchase an annuity, see *Re Castle*, [1916] W. N. 195.

(*x*) *Hunt-Foulston v. Furber*, 3 C. D. 285; *Re Mabbett*, [1891] 1 Ch. 707.

(*y*) *Carr v. Carr*, 1 Meriv. 541, note to *Devaynes v. Noble*. See

And under a bequest of "all and every sum or sums of money which may be due to me at my decease," it has been held, that damages recovered in an action by an executor for a breach of covenant committed in the lifetime of a testator will pass (z). And moneys receivable under a policy of assurance on the testator's life to which he was entitled, were held to pass under a bequest of "any money that I may die possessed of, or which may be due and owing to me at the time of my decease" (α).

But, where a testator bequeathed all his ships and money due to him at the time of his decease, to A. B., it was held that freight earned by a ship under a charter-party executed after the date of the Will, and in respect of a voyage not completed until after the testator's death, did not pass to A. B. either as "money due," or as incident to the ship (b).

Where the testator bequeathed all his ready money and debts due and owing to him *at his death* to A., and all his government stock and funds, and personal estate, to B.; and after making his Will, sold out a certain sum of stock, and lent it upon bond, conditioned for replacing the stock on a day specified, *which day he survived*: Sir Wm. Grant held, that this bond passed to A., under the bequest of the testator's *debts*, the question depending on what was the actual description of the property at the time of his death, and the circumstance that the debtor might still transfer the stock, not being allowed to alter or affect the rights of parties (c).

In the case of *Stenhouse v. Mitchell* (d), Lord Eldon was of opinion, that the words "debts due at my death from A., whether by bonds or mortgages, or open accounts," would have passed only debts *ejusdem generis* with the securities specified, and would, therefore, not have included a judgment debt, had not the context of the Will disclosed a larger intention (e).

The bequest of a debt due on a particular security will pass

also *Parker v. Marchant*, 1 Phil. Ch. C. 361, *per* Lord Lyndhurst, *accord*.

(z) *Bide v. Harrison*, L. R. 17 Eq. 76.

(α) *Petty v. Willson*, L. R. 4 Ch. 574.

(b) *Stephenson v. Dowson*, 3 Beav. 342. This case was decided on the ground that the freight was not a debt due to the testator at the time of his death, because no debt accrued until the service had been completed, which did not happen till after the death of the testator.

(c) *Essington v. Vashon*, 3 Meriv. 434.

(d) 11 Ves. 356.

(e) But see *Bridges v. Bridges*, Vin. Abr. tit. Deviso (O. b.), pl. 13. *Chalmers v. Storil*, 2 Ves. & Bea. 222.

the capital only, and not arrears of interest due at the testator's death (*f*); and *e converso*, the bequest of *arrears* of a debt will not pass the principal (*g*).

In *Collins v. Doyle* (*h*), a testatrix who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeathed "all such sums of money as should be owing to me at the time of my decease from G. B.:" And it was holden by Lord Gifford, that these words would not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate.

But in *Bainbridge v. Bainbridge* (*i*), where testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death), bequeathed as follows: "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children;" Sir L. Shadwell, V.-C., held, that the son's residue passed by the request.

A bequest of "debts and accounts due to me" does not include the apportioned part of dividends declared after the testator's death (*j*).

Jewels."
"Pearls."
"Necklaces."

"Jewels." In the *Attorney-General v. Harley* (*k*), a testatrix directed all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeathed the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches, to B.; by a subsequent testamentary disposition she gave all her trinkets of every denomination, her jewels excepted,

(*f*) *Roberts v. Kuffin*, 2 Atk. 112; *Harvey v. Cooke*, 4 Russ. Chanc. Cas. 34. But where the bequest was of "all my interest and claim on household property in W. on which I have a mortgage of 1,500l.," the legatee was held entitled to the arrears of interest due upon the mortgage at the time of the testator's death: *Gibbon v. Gibbon*, 13 O. B. 205. And where a testator gave "the amount of the bond from J. H.," it was held that the legatee was entitled to the arrears of interest upon the bond as well as to the principal: *Harcourt v. Morgan*, 2 Keen, 274.

(*g*) *Hamilton v. Lloyd*, 2 Ves. Jun. 416.

(*h*) 1 Russ. Chanc. Cas. 135.

(*i*) 9 Sim. 16. But it seems that the estate out of which the money bequeathed is payable must have been got in by the executor so as to constitute a debt from him. It is otherwise if the estate has not so been got in: *Martin v. Hobson*, L. R. 8 Ch. 401; and see the observations of James, L. J., in that case on the case of *Bainbridge v. Bainbridge*, *ib.* 405.

(*j*) *Re Burke*, [1914] 1 Ir. 81.

(*k*) 5 Russ. 173. A bag of coins found by executors in a testator's strong box were held not to pass under a bequest of "jewellery." *Sudbury v. Brown*, 4 W. R. 736.

to C.; and, in another part of the same instrument, directed her jewels to be sold; afterwards, by a third testamentary instrument, she bequeathed to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds; the testatrix was possessed of a very valuable diamond necklace and cross, and of a pearl necklace, beside other necklaces, and of various diamond rings, besides those which were specifically bequeathed: And it was held by Lord Lyndhurst, that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were not to be sold, and did pass to B.: His Lordship further held, that the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls.

The term "plate" has been held to be confined to articles of "Plate." solid silver and not to include a plated service (*l*). Articles which are merely mounted with silver cannot be classified as plate or plated articles (*m*).

"Books." In *Willis v. Curtois* (*n*), a question arose under "Books." the Will of the celebrated Dr. Willis, whether a collection of books bound into volumes, which contained manuscript notes of his attendance upon King George III., would pass by a bequest to his nephew, a gentleman engaged in the like branch of the medical profession as the testator, of "all and every the books in and about my house in Tenterden Street." Lord Langdale, M. R., held in the affirmative. A stamp album will not pass under a gift of "books" (*o*).

A library will not pass under a bequest of furniture, but books and manuscripts which are of rarity and antiquity may pass as "articles of virtu and curiosities" (*p*).

"Personal ornaments." In the construction of the same "Personal ornaments." Will, his Lordship held, that a pocket-book and a case of instruments, usually carried about the person of the testator, did not pass under a bequest of "personal ornaments." But the learned judge inclined to be of opinion that a gold pencil case, toothpick case, lip-salve box, and eye-glass, similarly circumstanced, would pass.

(*l*) *Holden v. Ramsbottom*, 4 Giff. 205. As to plate at bankers, see *ante*, p. 934.

(*m*) *Re Lewis*, [1910] W. N. 6.

(*n*) 1 Beav. 189.

(*o*) *Re Masson*, 86 L. J. Ch. 753.

(*p*) *Re Zouche*, [1919] 2 Ch. 178.

“Linen and clothes.”

“Linen.” Under this term, without qualification, table and bed linen, and every article to which that general word can be applied will pass: But where there is a bequest of “all linen and *clothes* of all kinds,” it has been held, that only body linen will pass (*q*).

“Medals.”

“Medals.” By this word, curious pieces of current coin, which have been kept by the testator with his medals, have been held to pass (*r*).

“Portraits.”

“Portraits.” Where a testator bequeathed the *portraits* of himself, of his grandfather and grandmother, and of his mother, and of the Duke of Schomberg, to A. B.; and the testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarter portrait and a portrait in crayon of the Duke of Schomberg, and also a picture in which the duke is represented on horseback, with a battle in the distance; it was held that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest (*s*).

Mistakes in the description of a legacy.

Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstance, taken together (*t*).

The error of the testator, says Swinburne (*u*), in the proper name of the thing bequeathed, did not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: As for instance, the testator bequeathed his horse Cripple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatary may have the horse by the last denomination; for the testator’s meaning was certain, that he should have the horse; if therefore he hath the thing devised, it is not material if he hath it by the right or the wrong name.

Accordingly, in *Door v. Geary* (*v*), where a husband bequeathed to his wife 700*l.* East India stock, having none; but there was 700*l.* Bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator’s

(*q*) *Hunt v. Hort*, 3 Bro. C. C. 311.

(*r*) *Bridgman v. Dove*, 3 Atk. 202.

(*s*) *Duke of Leeds v. Amherst*, 13 Sim. 459, affirmed by Lord Lyndhurst, C.; and see *Re Layard*, 32 T. L. R. 517.

(*t*) *Ante*, p. 907 *et seq.*, and *infra*, note (*w*).

(*u*) Pt. 7, s. 5, pl. 7. See also *Godolph.* Pt. 3, c. 25, s. 10.

(*v*) 1 Ves. Sen. 255.

debts, and which the husband afterwards transferred in his own name; Lord Hardwicke held, that the 700*l.* Bank stock should go to the wife; the learned judge being of opinion, that, as it was a case merely of error of description, the words "East India" should be rejected: and his Lordship said it was no greater mistake than the devise of a black horse, the testator having only a white horse, where the word "black" shall be rejected (*w*).

Again, where the intention of the testator is plain, a mistake in his calculation shall not defeat that intention. Thus in *Milner v. Milner*(*x*), Sir W. Milner bequeathed a legacy in this manner: "I give my daughter Mary 3,500*l.*, which with 6,000*l.* she is entitled to by my marriage settlement, and 500*l.* from her father-in-law, make up 10,000*l.*, which I design for her fortune." In fact she was entitled only to 5,000*l.* by the settlement: And Lord Hardwicke held, that she was entitled to have 4,500*l.* under the Will. Again, in *Ouseley v. Anstruther*(*y*), a testator after reciting, inaccurately, that his wife was entitled for life to 39,000*l.* settled on his marriage, which he stated would, at four per cent., yield 1,560*l.*, directed his trustees to add an annuity of 440*l.* to raise her jointure to 2,000*l.*: And it was held that she was entitled to have her annuity made up to 2,000*l.* at all events (*z*).

Where intention plain, a mistake in calculation will not defeat it.

So in *Trevor v. Trevor*(*a*), a testator gave his wife an annuity of 100*l.* and the sum of 1,000*l.*, which he considered would, with the property she was entitled to after his death, make up to her an income of 2,500*l.* a year. In fact those gifts made up her income only to 1,800*l.* a year: And Sir John Leach, M. R., held, that she was entitled to have the deficiency supplied out of the testator's residuary estate. Again, in

(*w*) See also Swinb. Pt. 7, s. 5, pl. 16; *Selwood v. Mildmay*, 3 Ves. 306, 310, and the remarks on this case of Tindal, C. J., in *Miller v. Travers*, 8 Bingh. 252, and of Lord Langdale, *Lindgren v. Lindgren*, 9 Beav. 362, 363, 365; *Gallini v. Noble*, 3 Meriv. 691; *Alfred v. Green*, 5 Madd. 92; *King v. Wright*, 14 Sim. 400; *Howard v. Conway*, 1 Coll. 87; *Purchase v. Shallis*, 2 H. & Tw. 354; *Quennell v. Turner*, 13 Beav. 240; *Goodlad v. Burnett*, 1 Kay & J. 341; *Edmunds v. Waugh*, 4 Drew. 275; *Waters v. Wood*, 5 De G. & Sm. 717; *Thompson v. Whitelock*, 4 De G. & J. 490; *Morgan v. Middlemiss*, 35 Beav. 278; *Ives v. Dodgson*, L. R. 9 Eq. 401; *Re Weeding*, [1896] 2 Ch. 364; *Re Mayell*, [1913] 2 Ch. 488.

(*x*) 1 Ves. Sen. 106; *Re Segelcke*, [1906] 2 Ch. 301.

(*y*) 10 Beav. 459.

(*z*) See also *Read v. Strangeways*, 14 Beav. 139.

(*a*) 5 Russ. 24.

Jordan v. Fortescue (*b*), a testator by a codicil gave to a legatee "500*l.* in addition to 1,500*l.* which I had before bequeathed to him:" The testator had in fact bequeathed to him 1,000*l.* only: And it was held that the legatee was entitled to 2,000*l.* by implication.

But in a more recent case, where a testator after reciting that he had advanced to a legatee a certain sum directed that sum to be considered as a payment on account of the legacy, and the advance in fact made was less than the sum recited as having been advanced, the legatee was held to be bound by the erroneous recital, and the sum mentioned by the testator was deducted from the legacy (*c*).

It has been held that where a testator has given a certain sum as a debt due to the person to whom he gives it, the circumstance that he does not owe to that person so much as he has given will, in the absence of evidence of intention to confer a bounty on the donee, either express or to be inferred from the whole Will, cut down the amount of the bequest to the amount of the debt actually due from the testator. Thus in *Wilson v. Morley* (*d*) a testator directed his debts to be paid, "including a debt of 300*l.* owing from me to my daughter." He owed his daughter 150*l.* only. It was held that she was not entitled to receive more than the 150*l.*

Erroneous
recital of
indebtedness.

An erroneous recital in a Will of indebtedness on the part of a testator to a legatee, even though accompanied by a direction to pay, will not amount to a gift of the supposed debt, in the absence of any indication in the Will of an intention of bounty in respect thereof; but such intention may be implied from the general scope of the Will (*e*).

Admissibility
of evidence to
ascertain the
thing be-
queathed.

The rules, which there already has been occasion to state (*f*) as to the admissibility of evidence of extrinsic facts, and of extrinsic evidence of intention, in order to enable the Court to

(*b*) 10 Beav. 259.

(*c*) *Re Aird's Estate*, 12 C. D. 291. This was followed in *Re Wood*, 32 C. D. 517, in which case *Re Taylor's Estate*, 22 C. D. 495, was referred to in argument as in effect overruling *Re Aird*. The above cases are explained in *Re Kelsey*, [1905] 2 Ch. 465.

(*d*) 5 C. D. 776. In this case, Fry, J., distinguished the case of *Whitfield v. Clemment*, 1 Mer. 402, on the ground that in that case there was inferred an intention to confer a bounty. Cf. *Re Rowe*, [1898] 1 Ch. 153.

(*e*) *Per* Vaughan-Williams, L. J., in *Re Howe*, *ubi supra*; *Re Kelsey*, [1905] 2 Ch. 465.

(*f*) *Ante*, p. 909 *et seq.*

identify the *person* intended by the testator to be the object of his bounty, are equally applicable, *mutatis mutandis*, as to the admissibility of such evidence for the purpose of making certain the *thing* intended to be bequeathed by him (*g*).

It may here be observed that what a party is entitled to under a contract he may well be taken to consider as his own. Thus lands contracted for will pass by a general devise of all the testator's lands and of all the lands purchased by him, although he had other lands purchased and actually conveyed (*h*). And so if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, it will pass (*i*). So if a testator, having contracted for the purchase of a large quantity of wool, should make his Will, bequeathing to one person all his personal estate except his wool, and to another all his wool, this would be a good bequest of the wool, although the party contracting to sell it had it not himself, but had to procure it to enable him to fulfil his contract (*k*).

Property contracted for by testator will pass by a description of it as testator's actual property.

(*g*) See further, on this subject, *Lindgren v. Lindgren*, 9 Beav. 358; *Ricketts v. Turquand*, 1 H. L. C. 472; *Webb v. Byng*, 1 Kay & J. 580; *Hewson v. Reed*, 5 Madd. 431. See also *Castle v. Fox*, L. R. 11 Eq. 542. If, on such evidence being admitted, it appears that there was property correctly answering to the specified description, no evidence can be admitted to show that the bequest was intended to apply to other property: *Horwood v. Griffith*, 4 De G. M. & G. 708, by Lord Justice Turner; *Webber v. Stanley*, 16 C. B. N. S. 698. Two rules which have been laid down with reference to uncertain description of lands the subject of devises, and the admissibility of extrinsic evidence, seem equally applicable to the bequests of personalty. These rules are firstly: that, when a devise is made in terms which apply specifically to a definite subject, the operation of that devise cannot be extended beyond the very terms in which it is expressed; nor can evidence be resorted to for the purpose of showing that something different from the description was intended by the testator. Secondly, that if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them, in order to place a sensible construction on the Will, the whole thing must be looked at fairly, in order to see what are the leading words of description and what is subordinate matter, and for this purpose evidence of extrinsic facts may be regarded: *Whitfield v. Langdale*, 1 C. D. 61, 74; *Hardwick v. Hardwick*, L. R. 16 Eq. 168, 175. See also *Gordon v. Gordon*, L. R. 5 H. L. 254; *Re Mayell*, [1913] 2 Ch. 488. See also as to *falsa demonstratio* in the case of devises of real estate, *Travers v. Blundell*, 6 C. D. 436; *Re Seal*, [1894] 1 Ch. 316; *Re Mayell*, *supra*.

(*h*) *Acherley v. Vernon*, 10 Mod. 518, 526.

(*i*) *Collison v. Girling*, 4 M. & Cr. 63, 75. See also *Ellis v. Eden*, 25 Beav. 482.

(*k*) *Collison v. Girling*, 4 M. & Cr. 74, 75. See also *Field v. Peckett*, 29 Beav. 573, where cabinets ordered and made but not delivered to the testator before his death passed under a bequest of "furniture."

SECTION V.

Legacies Vested or Contingent.

There has already been occasion to show (*l*), that contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to the executors or administrators of the party dying before the contingency on which they depend, takes effect: But where that contingency is the endurance of life of the party till a particular period, the interest will obviously be altogether extinguished by his death before that period.

Object of section.

The object of the present section is to ascertain the circumstances under which a legacy is to be regarded as a vested interest, or as contingent on the event of the endurance of the life of the legatee: or, in other words, in what cases the interest in a legacy will be so fixed as to be transmissible to the executor or administrator of the legatee, though he die before the time arrives for the payment of the money; and on the other hand, in what cases the legacy will lapse by the death of the legatee.

General principle as to lapse of legacies by death of legatee.

The general principle, as to the lapse of legacies by the death of the legatee, may be stated to be, that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee. It is proposed, in pursuing this subject, to treat, 1st. Of legacies lapsed by the death of the legatee before the death of the testator: 2ndly. Of legacies lapsed by the death of the legatee after the death of the testator: 3rdly. Of the lapse of legacies charged on a real fund: 4thly. Of the lapse of legacies charged on a mixed fund of realty and personalty.

1. *Legacies lapsed by the death of the Legatee before the Testator.*

General rule that unless the legatee survive the testator the legacy lapses,

It has been established from the earliest periods, both in the Ecclesiastical Courts and in Equity, that unless the legatee survive the testator, the legacy is extinguished: neither can the executors or administrators of the legatee demand the same(*m*).

(*l*) *Ante*, p. 666.

(*m*) *Swinb.* Pt. 7, s. 23, pl. 1; *Godolph.* Pt. 3, c. 25, s. 25; *Wentw. Off. Ex.* 436, 14th edit.

And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house, in which case he lays it down, that as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee. In cases of this kind the question of survivorship is, by the law of England, a matter of evidence merely, and, in the absence of evidence, there is no rule or conclusion of law on the subject: And as the onus of proof lies on the representatives of the legatee, they cannot claim the legacy, unless they can produce positive evidence that he was the survivor (n).

Not only in cases of bequests of money, or of other chattels in possession, but also of a debt due from the legatee to the testator, the legacy will lapse by his death before the testator, and the executor of the legatee must pay the money: Thus in *Maitland v. Adair* (o), the words in the Will were, "I devise to my brother 2,000*l.*: I also return him his bond for 400*l.*, with interest thereon, which he owes me." The brother died in the lifetime of the testator: The bond was a joint bond in the

(n) *Underwood v. Wing*, 4 De G. M. & G. 633; 19 Beav. 459; *Taylor v. Diplock*, 2 Phillim. 261, ante, p. 379; *Satterthwaite v. Powell*, 1 Curt. 705; *Barnett v. Tugwell*, 31 Beav. 232. It will be observed that Swinburne, in the passage above cited, assumes that the testator and legatee must be taken to have died at the same time: And it appears to have been sometimes deemed a rule in the Ecclesiastical Court, that they must, under such circumstances, be presumed to have perished at the same moment, unless proof can be obtained as to the exact time when either of them died: *In the goods of Selwyn*, 3 Hagg. 749. But it can hardly be assumed as a fact that two human beings ceased to breathe at the same moment of time: *Underwood v. Wing*, 4 De G. M. & G. 661, by Lord Cranworth, C. And in the same case, in the House of Lords, *sub nom. Wing v. Angrave*, 8 H. L. C. 183, it was laid down that there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause: Nor is there any presumption of law that all died at the same time. But the question is one of fact, depending wholly on evidence; and if the evidence does not establish the survivorship of any one, the law will treat it as matter incapable of being determined: The *onus probandi* is on the person asserting the affirmative: see *In the goods of Shilling*, Dea. & Sw. 183. See also *Colvin v. Procurator-Gen.*, 1 Hagg. 92; *Sillick v. Booth*, 1 Y. & Coll. Ch. C. 117, 126; *Ommaney v. Stilwell*, 23 Beav. 328; *In the goods of Wainwright*, 1 Sw. & Tr. 257; *In the goods of Wheeler*, 31 L. J. P. M. & A. 40; *In the goods of Carmichael*, 32 L. J. P. M. & A. 70; *Re Green's Settlement*, L. R. 1 Eq. 288; *Re Benham's Trusts*, L. R. 4 Eq. 416; *Re Phene's Trusts*, L. R. 5 Ch. 139; *Re Lewe's Trusts*, L. R. 6 Ch. 356; *Re Walker*, L. R. 7 Ch. 120; *Hickman v. Upsall*, L. R. 20 Eq. 136; *Re Rhodes*, 36 C. D. 586; *Re Benjamin*, [1902] 1 Ch. 723; *Re Aldersey*, [1905] 2 Ch. 181. See ante, p. 227, as to presumption of death.

(o) 3 Ves. 231.

Scotch form, by the testator's brother and son: The question was, whether the disposition of the bond by the Will amounted to a release, or was only a legacy, and therefore lapsed: Lord Loughborough, C., held very clearly, that it was a legacy to the brother which had lapsed (*p*).

Where, however, a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his Will, and the schedule contained both the names of the creditors and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations: it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees, but as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the Will (*q*).

even where
the legacy is
given to the
legatee and
his executors,
&c.:

Even in a case where a legacy is given to a man *and his executors, administrators, and assigns*, or to a man *and his representatives*, if the legatee dies before the testator, though the executors are named, yet the legacy is lost: for the words "executors, administrators and assigns, &c.," are considered as only descriptive of the interest bequeathed; and those who take by representation only cannot be entitled to anything to which the person they represent never had any title (*r*).

(*p*) See further on this subject, *Elliott v. Davenport*, 1 P. Wms. 83; *Toplis v. Baker*, 2 Cox, 118; *Izon v. Butler*, 2 Price, 34; *Att.-Gen. v. Holbrook*, 3 Y. & J. 114; *S. C.*, 12 Price, 407.

(*q*) *Williamson v. Naylor*, 3 Y. & Coll. 208. See also accord. *Philips v. Philips*, 3 Hare, 281. Where a testator, who was a certificated bankrupt, directed his executors to pay in full all his creditors who had proved in the bankruptcy, it was held that this direction must be regarded as a bounty, not only in favour of those creditors who survived the testator, but of the representatives of those who predeceased him; for that his object was to discharge a moral duty, which object could not be attained if his bounty was to be limited to those creditors who survived him: *Re Sowerby's Trust*, 2 Kay & J. 630; *S. C.*, *nomine Turner v. Martin*, 7 De G. M. & G. 429; *Stevens v. King*, [1904] 2 Ch. 30. In the last-mentioned case Farwell, J., says: "I think that the cases of *Williamson v. Naylor* [*ubi supra*], *Philips v. Philips* [*ubi supra*], and *In re Sowerby's Trust* [*ubi supra*] have established the rule that, if the Court finds, upon the construction of the Will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime, and therefore death in such a case does not cause a lapse."

(*r*) *Elliott v. Davenport*, 1 P. Wms. 83; *Corbyn v. French*, 4 Ves. 435; *Shuttleworth v. Greaves*, 4 My. & Cr. 35; *ante*, p. 894 *et seq.*

So where a legacy is given to A. for life, and after the death of A. to B. or *his proper representatives, in case of his dying before A.*, if B. dies in the lifetime of the testator, the legacy lapses (s). Again, if a legacy be given to a man, and directed to be paid to *him* or *his executors*, or administrators, or personal representatives, or to his heirs, *at the end of a year after the testator's death*, and the legatee die before the testator, the legacy intended for him will lapse (t).

But if instead of the words "personal representatives," the word "heirs" be used, it has been held that this shows an intention on the part of the testator, that the persons he designates as "heirs" are to take by way of substitution whenever the legatee may die, and there shall be no lapse though he die in the lifetime of the testator (u). In such a case the heirs do not take by way of transmission or as representatives, but as *personæ designatæ* (x).

In *Edwards v. Saloway* (y) there was a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or Will, and a gift in default of such appointment to her next of kin, as in case of an intestacy: And Lord Cottenham, C., held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin, according to the statute, were entitled to the benefit of it (z).

But this general rule may be controlled by the manifest intention of the testator, appearing on the face of the Will, that the legacy shall not lapse, and by his providing a substitute for

this rule controlled by the manifest intention of

(s) *Corbyn v. French*, 4 Ves. 418, 435. It will be observed, that the substitution of the executors in this case did not refer to the legatee's dying before the testator, but to his dying before the time of the payment of the legacy. See accord. *Bone v. Cook*, M'Clel. 169; *S. C.*, 13 Price, 332.

(t) *Tidwell v. Ariel*, 3 Madd. 403. See also *Smith v. Oliver*, 11 Beav. 494; *Thompson v. Whitelock*, 4 De G. & J. 490.

(u) *Re Porter's Trusts*, 4 Kay & J. 188; and see the observations of Wood, V.-C., 4 Kay & J. 196, as to the construction put on the word "heir" in *Tidwell v. Ariel*, *ubi supra*. But where a testator bequeathed a silver cup to Lord S. and his heirs as a heirloom, and the person who was Lord S. at the date of the Will died before the testator leaving a successor to the title, it was held that the bequest lapsed: *Re Whorwood*, 34 C. D. 446.

(x) See *ante*, p. 873 *et seq.*, as to the meaning of the word "heir" in such cases.

(y) 2 Phil. C. C. 625.

(z) See accord. *Nicholls v. Haviland*, 1 Kay & J. 504. But see *Baker v. Hanbury*, 3 Russ. Ch. C. 340.

testator, a
substitute
being declared
for the
legatee:

substitution
implied by a
bequest to
"A. or his
personal
representa-
tives," or to
"A. or his
heirs:"

the legatee dying in his lifetime (a); though, in order to effect this object he must, in clear words, exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his lifetime (b).

Thus where there is a bequest "to A. or his personal representatives," or "to A. or his heirs," the word "or," generally speaking, implies a substitution, so as to prevent a lapse (c).

But in the case of a bequest to children, &c. in a class, and the representatives of such as are dead, a question may arise whether the representatives are to take by way of original substantive limitation, or by way of substitution only. If by the latter, none are entitled but such as represent parties who could have taken as original legatees. A gift to issue is *substitutional*, when the share which the issue are to take is, by a prior clause, expressed to be given to the parent of such issue, and a gift to issue is an *original* gift, when the share which the issue are to take is not, by a prior clause, expressed to be given to the parent of such issue (d).

(a) *Sibley v. Cook*, 3 Atk. 572; *Toplis v. Baker*, 2 Cox, 121; *Bridge v. Abbott*, 3 Bro. C. C. 224; *Browne v. Hope*, L. R. 14 Eq. 343; *Re Greenwood*, [1912] 1 Ch. 392; *Re Smith, Prada v. Vandroy*, [1916] 2 Ch. 368. But it is not allowable to prove this intention by evidence *dehors* the Will: *Maybank v. Brooks*, 1 Bro. C. C. 84.

(b) *Browne v. Hope*, L. R. 14 Eq. 343.

(c) *Gittings v. McDermott*, 2 M. & K. 69, and the authorities collected *ante*, pp. 881, 882; compare p. 874.

(d) *Lamphier v. Buck*, 2 Dr. & Sm. 494; *Christopherson v. Naylor*, 1 Mer. 320; *Butter v. Ommaney*, 4 Russ. 73. See also *Re Webster's Estate*, 23 C. D. 737, in which case Kay, J., says: "The law was settled long ago in the case of *Christopherson v. Naylor*. There a rule was laid down that where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently, if the parent was dead at the date of the Will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift." Now, beyond all doubt that is still the law. It was laid down in the case of *Christopherson v. Naylor*, and that case has been recognised by James, L. J., in *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643, and by the Court of Appeal in the cases of *Hunter v. Cheshire*, L. R. 8 Ch. 751, *West v. Orr*, 8 C. D. 60, and *Re Musther*, 43 C. D. 569. The rule in *Christopherson v. Naylor* has not always been accepted without question: see *Parsons v. Gulliford*, 10 Jur. N. S. 231; *Gowling v. Thompson*, L. R. 11 Eq. 366 (n); *Re Potter's Trust*, L. R. 8 Eq. 52; *Adams v. Adams*, L. R. 14 Eq. 246; *Re Speakman*, 4 C. D. 620 (dissenting from *Stewart v. Jones*, 3 De G. & J. 532, which latter case was distinguished in *Re Roberts*, 27 C. D. 346; 30 C. D. 234); *Re Lucas's Will*, 17 C. D. 788: and there is a good deal of authority to show that the rule is subject to the rule laid down in *Re Potter's Trust*, *ubi supra*, viz., that, where there is a gift to a class of persons, with

But if there is an original substantive gift to two classes of legatees, viz., first to the children of a legatee for life, living at the time of his decease: and, secondly, to the issue of such of them as shall then be dead leaving issue, the issue of a *child who was dead at the date of the Will* may be entitled to a share (e).

substitution to their issue in case of their dying, that means, that whether they are dead when the Will is made or die afterwards, the substituted class takes in each case. The two rules are difficult to reconcile, but the great majority of cases in which the rule in *Re Potter's Trust* has been applied, may be explained upon the principle of *Loring v. Thomas*, 1 Dr. & Sm. 497, in which Kindersley, V.-C. (disapproving the decision of Sir J. Leach, M. R., in *Waugh v. Waugh*, 2 M. & K. 41, upon a Will containing the words "so that the children should take only the share which their parent would have taken if living,") pointed out that such a gift was not necessarily to be construed as a substitutional gift in the sense of *Christopherson v. Naylor*, but a gift to the issue, not of the share of the deceased parent, but of the share which the parent of the issue would have taken if living at the death of the testator, which might well include the children of a parent who was dead at the date of the Will. Probably the rule in *Christopherson v. Naylor* will be applied in cases where the gift is a gift to the children or their heirs without more, but, where there is something more, the question will always be, whether an intention that the gift should not be treated as substitutional can be extracted from the Will on grounds similar to those acted on in *Tytherleigh v. Harbin*, 6 Sim. 329; *Loring v. Thomas*, *ubi supra*; *Re Philps' Will*, L. R. 7 Eq. 151; *Haerbergham v. Ridehalgh*, L. R. 9 Eq. 395 (*per James*, V.-C.); *Re Smith's Trusts*, 5 C. D. 497 (n); *Re Sibley's Trusts*, 5 C. D. 494; *Wingfield v. Wingfield*, 9 C. D. 658; *Re Woolrich*, 11 C. D. 663. The cases of *Re Chinery*, 39 C. D. 614, and *Re Musther*, 43 C. D. 569, strongly confirm the rule in *Christopherson v. Naylor*, and in *Re Wood* [1894] 3 Ch. 381, at p. 387, Davey, L. J., says: "Notwithstanding the opinion expressed by Vice-Chancellor Malins in *In re Potter's Trust*, I think that *Christopherson v. Naylor* was rightly decided, and so the Court of Appeal held in *In re Musther*." The rule in *Loring v. Thomas*, *supra*, is a definite rule of construction and its authority has been recognised by the House of Lords in *Barraclough v. Cooper*, [1908] 2 Ch. 121 n. It has also been followed in many recent cases; see *Re Lambert*, [1908] 2 Ch. 117 (distinguishing *Goringe v. Mahlstedt*, [1907] A. C. 225); *Re Metcalfe*, [1909] 1 Ch. 424; *Re Williams*, [1914] 2 Ch. 61, and *Re Kirk*, 85 Ll. J. Ch. 182; cf. *Re Cope*, [1908] 2 Ch. 1.

(e) *Tytherleigh v. Harbin*, 6 Sim. 329; *Giles v. Giles*, 8 Sim. 360; *Coulthurst v. Carter*, 15 Beav. 421. It is obviously impossible to lay down any general rule as to what words shall, and what shall not, render a gift substitutional, but it may be useful to cite a few instances of words the presence of which in a testamentary clause has been held not necessarily to import that the gift is substitutional. Thus the words "shall die," "should die," have been held not to have that effect: *Loring v. Thomas*, 1 Dr. & Sm. 497, even though coupled with a provision that the issue of the children so dying should have the parent's share: *Smith v. Smith*, 8 Sim. 353 (disapproving *Thornhill v. Thornhill*, 4 Madd. 377, which latter case was, however, approved by North, J., in *Re Hannam*, [1897] 2 Ch. 39). Words of futurity like "shall" may be read as applying to the past, but they will not

With regard to the exclusion of those claiming under a substitutional gift who cannot predicate of the person first named as taker that he might have taken, the distinction must be remembered between a substitutional gift after a bequest to a class and one following a gift to individuals named in the Will. In the former case the test must necessarily be this, was the deceased, whose share is claimed, a member of the class? (f) In the latter case the substituted legatee is presumed to have been introduced into the Will in order to prevent a lapse. This distinction has been recognised and acted upon in many cases (g).

Lapse of
legacy given
under a power

The general rule of equity relating to lapses is equally applicable, whether the legacy be given under a Will, made by

be so read without sufficient reason: *Re Brown*, [1917] 2 Ch. 232, following *Gorringe v. Mahlstedt*, [1907] A. C. 225; and see *Re Williams*, [1914] 2 Ch. 61. The use of the word "or" is not conclusive that the gift is substitutional; nor, on the other hand, is the use of the word "and," as introducing the second gift, conclusive that such gift is original. See *Re Merrick's Trusts*, L. R. 1 Eq. 551; *Hurry v. Hurry*, L. R. 10 Eq. 346; *Re Woolley*, [1903] 2 Ch. 206.

(f) *Re Hannam*, [1897] 2 Ch. 39. Cf. *Re Schnadhorst*, [1901] 2 Ch. 338; [1902] 2 Ch. 234.

(g) See *Ive v. King*, 16 Beav. 46, and the cases cited *ante*, p. 962, note (d), and *post*, p. 970, note (g). See also *Hodgson v. Smithson*, 8 De G. M. & G. 604; *Cambridge v. Rous*, 25 Beav. 409; *King v. Cleaveland*, 4 De G. & J. 477; *Re Faulding's Trust*, 26 Beav. 263; *Timins v. Stackhouse*, 27 Beav. 434; *Ashling v. Knowles*, 3 Drew. 593; *Re Porter's Trusts*, 4 K. & J. 188, 192; *Hobgen v. Neale*, L. R. 11 Eq. 48; *Hume v. Lloyd*, 47 L. J. Ch. 775. It may here be observed that, in gifts of this description, where issue are substituted for their parents, the substituted issue can in no case take vested interests during their parents' lifetime, and consequently issue, who predecease their parent, are not entitled to any share in the fund: *Re Bennett's Trust*, 3 K. & J. 280; *Crause v. Cooper*, 1 J. & H. 207; *Humfrey v. Humfrey*, 2 Dr. & Sm. 49; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Re Merrick's Trusts*, L. R. 1 Eq. 551; *Hurry v. Hurry*, L. R. 10 Eq. 346; *Re Woolley*, [1903] 2 Ch. 206. But the rule has been held to be different where the gift to the issue is an original gift. In such a case it was decided, after much consideration, by Kindersley, V.-C., in *Lanphier v. Buck* (*ubi supra*), that they need not survive their parent in order to take; unless the language of the Will precludes children from taking who do not survive their parent, as when the gift is to the issue of such nephews and nieces as should have died before the tenant for life, leaving issue: for in such a case such children only as were left by the parent, *i.e.*, as survive him, are to take. See, however, *Re Smith's Trusts*, 7 C. D. 665. But whether the gift to the issue be original or substituted, the issue, in order to take, need not survive the tenant for life: *Re Wildman's Trusts*, 1 J. & H. 299; *Re Pell's Trusts*, 3 Giff. 152; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Martin v. Holgate*, L. R. 1 H. L. 175, reversing *S. C.*, *sub nom.* *Holgate v. Jennings*, 34 Beav. 79; *Re Orton's Trust*, L. R. 3 Eq. 375; *Re Woolley*, *ubi supra*. See, however, *Re Kirkman's Trusts*, 3 De G. & J. 558; *Re Corrie's Will*, 32 Beav. 426.

virtue of donorship flowing originally from the testator, or whether it be given under a power created for the purpose; for, in the latter case, although the legatee will take under the authority of the power, yet he will not be considered as taking from the time of its creation, so as to prevent a lapse, occasioned by the death of the legatee before the appointor when the power is executed by Will; and for the following reasons: The legatee does not take unto the power solely and exclusively, but under it and the Will jointly: The Will so made is to be construed and considered like all others: It is, therefore, ambulatory, revocable, and incomplete, till the death of the testator; consequently, no person can take under it, who does not survive him. If, then, an appointee by Will made under a general power, die before the testator, his legacy will not be transmissible to his executors or administrators (*h*).

by death of
legatee before
appointor.

It is requisite further to consider the general rule above stated, as applied to legacies given in joint tenancy, or in tenancy in common. If a legacy be given to two persons *jointly*, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee (*i*).

As to legacies
given to joint
tenants:

But where legacies are given to legatees, as tenants in common, as where an aggregate fund is to be divided among them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue (*k*).

to tenants in
common:

The law is the same, as to survivorship in cases of joint-tenants (*l*), and as to lapse in cases of tenants in common (*m*), when the testator revokes the interest originally given to one of them.

effect of
revocation:

(*h*) *Oke v. Heath*, 1 Ves. Sen. 135, 141; *Duke of Marlborough v. Godolphin*, 2 Ves. Sen. 73; *Vanderzee v. Aclom*, 4 Ves. 771; *Burges v. Maubey*, 10 Ves. 319, 326; *Easum v. Appleford*, 5 My. & C. 56; *Master v. Laprimaudaye*, 2 Coll. 443; *Woodcock v. Renneck*, 1 Phil. Ch. O. 72; *Jones v. Southall*, 32 Beav. 31.

(*i*) *Buffar v. Bradford*, 2 Atk. 220; *Dowset v. Sweet*, Ambl. 175; *Morley v. Bird*, 3 Ves. 628. But in *Re Kerr's Trusts*, 4 C. D. 600, Jessel, M. R., refused to apply the rule in the case of an appointment to an object of the power and a stranger.

(*k*) *Bagwell v. Dry*, 1 P. Wms. 700; *Owen v. Owen*, 1 Atk. 494; *Peat v. Chapman*, 1 Ves. Sen. 252; *Baxter v. Losh*, 14 Beav. 612.

(*l*) *Humphrey v. Tayleur*, Ambl. 136; *Young v. Davies*, 2 Dr. & Sm. 167.

(*m*) *Cresswell v. Cheslyn*, 2 Eden, 123; *Shaw v. M'Mahon*, 4 Dr. & W. 431; *Sykes v. Sykes*, L. R. 3 Ch. 301. In *Harris v. Davis*, 1 Coll. 416, no doubt was thrown upon the principle, though the

to tenants in common in a class :

What constitutes a class gift :

But it must be observed, that where a legacy is given *to a class* of persons in general terms as tenants in common, as the children of A., the death of one of them before the testator will not occasion a lapse of any part of the fund; but those of the described class, who survive the testator, will take the whole (*n*). Where there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator (*o*). So also where there was a revocation by codicil of a share of a member of the class, the gift was divisible among the other members of the class (*p*).

The cases on this subject were considered by Lord Davey in *Kingsbury v. Walter* (*q*), in which it was held, that a class gift

operation of *Cresswell v. Cheslyn*, *ubi supra*, was excluded by the very special words in the codicil, *per* Lord Cairns, C., in *Sykes v. Sykes*, *ubi supra*; *Re Whiting*, [1913] 2 Ch. 1; *Re Wilkins*, [1920] W. N. 197.

(*n*) *Viner v. Francis*, 2 Cox, 100; *Cort v. Winder*, 1 Coll. 320; *Lee v. Pain*, 4 Hare, 250; *Shaw v. M'Mahon*, 4 Dr. & W. 431, 438; *Leigh v. Leigh*, 17 Beav. 605; *Fitzroy v. Richmond*, 27 Beav. 186; *Re Stanhope's Trust*, *ibid.* 201; *Re Coleman*, 4 C. D. 165; *Fell v. Biddolph*, L. R. 10 C. P. 701; *Re Jackson*, 25 C. D. 162; *Re Colley's Trusts*, L. R. 1 Eq. 496; *Dimond v. Bostock*, L. R. 10 Ch. 358. *Secus*, where it appears that the testator did not intend to give to a class incapable of being ascertained at the time, but to individuals who are, or who are capable of being, enumerated: *Bain v. Lescher*, 11 Sim. 397; *Havergal v. Harrison*, 7 Beav. 49; *Re Smith's Trusts*, 9 C. D. 117; *Re Stansfield*, 15 C. D. 84. Or where the survivors would not take the fund in the same manner, or in the same shares and proportions, as the testator says they are to take it: *Re Ham's Trust*, 2 Sim. N. S. 106. As to the distinction between a gift to persons of aliquot parts of a fund and a gift to persons as a class, see *Ramsay v. Shelmerdine*, L. R. 1 Eq. 129. The naming of one individual member does not prevent the gift being a gift to a class: *Re Jackson*, *ubi supra*; but, in order to constitute a named person a member of a class, he must have a common character with the unnamed members of the class: *Re Featherstone's Trusts*, 22 C. D. 111. A bequest to a brother for life, and at his death "to be equally divided amongst his surviving children, and my niece, R. W.," is not a gift to a class: *Drakeford v. Drakeford*, 33 Beav. 43. A bequest to persons "hereinbefore named," or "hereinafter named" or "hereinbefore mentioned" or "hereinafter mentioned," cannot be regarded as a gift to a class: *Re Gibson*, 2 Johns. & H. 656. See *post*, p. 969, note (*e*).

(*o*) *Per* Lord Macnaghten, in *Kingsbury v. Walter*, [1901] A. C. at p. 191.

(*p*) *Re Dunstan*, [1909] 1 Ch. 103, not following *Ramsay v. Shelmerdine*, *supra*.

(*q*) [1901] A. C. at p. 192.

was intended. His Lordship says: "The question, I agree, is whether a gift in this case to 'Elizabeth Jane Fowler and the children of my sister Emily Walter,' is what is called, by an expression well known in our law, a class gift. *Primâ facie* a class gift is a gift to a class, consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. That definition is in accordance with that given by Lord Selborne in the case referred to in North, J.'s, judgment, in *Pearks v. Moseley* (*r*), and by Lord Hatherley, then Wood, V.-C., in a case which has also been referred to at the bar, *In re Chaplin's Trusts* (*s*). But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made 'to all my nephews and nieces including A.,' or if a gift is made 'to C. and all other my nephews and nieces,' each of those would be a class gift. *Stanhope's Case* (*t*) is an example: There the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty, J., *In re Jackson* (*u*), where the gift was to five named individuals and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty, J., held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. That case seems to me to have a considerable bearing upon the case now before the House.

"There may also be a composite class, such as, for instance, children of A. and children of B.: that would be a good class. On the other hand, a gift to A. and all the children of B. is, in my opinion, *primâ facie* not a class gift, and I think that has been so decided, and rightly decided, in the case of *In re Chaplin's Trusts* (*v*), which I have already referred to, and also in a case before Sir George Jessel of *In re Allen, Wilson v. Atter* (*w*). . . .

(*r*) (1880) 5 A. C. 714.

(*s*) (1863) 33 L. J. Ch. 183.

(*t*) (1859) 27 Beav. 201.

(*u*) 25 O. D. 162.

(*v*) (1863) 33 L. J. Ch. 183.

(*w*) 29 W. R. 480; 44 L. T. N. S. 240.

“My Lords, another principle which is, I think, established in this branch of the law is, that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A. for life and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life. My Lords, it is, I conceive, on that ground that the other case to which I referred, namely, *Drakeford v. Drakeford* (x), was decided. The learned judge, Lord Romilly, there said that the gift which he had before him in that case was not a class gift. It was in this form a gift to A. for life, and at his death to be equally divided between his surviving children and the testator's niece, Rosamond Willows. There, as your Lordships see, only those children who survived the tenant for life would have taken, whereas Rosamond Willows' interest would have become vested at the testator's death. On that ground Lord Romilly held that it was not a class.”

to tenants in
common with
a clause of
survivorship :

A further exception, as to the doctrine of lapse in cases of legacies given to tenants in common, occurs in instances where the Will contains a limitation over of the legacy to the survivors (y). Thus in *Mackinnon v. Peach* (z), the testator bequeathed to his two daughters his plate and plated ware, together with the pearls, &c., in his possession, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to her sister: One of the daughters died unmarried in the testator's lifetime: And Lord Langdale, M. R., held, that the surviving daughter was entitled to the whole of the articles bequeathed; for that the circumstance of the deceased daughter, who would have taken as tenant in common if both had survived the testator, having died in his lifetime, did not prevent the gift over to her sister from taking effect (a).

questions
whether the
accrued as
well as
original

In such cases, if more than one of the legatees happen to die before the testator, a question arises, whether the original shares only, or the accrued as well as the original, pass to the survivors. The general rule is, that where distinct legacies are given with

(x) 33 Beav. 43, 48.

(y) See *Baxter v. Losh*, 14 Beav. 612. See also *Smith v. Pybus*, 9 Ves. 566, and the cases collected, *post*, p. 970, note (g).

(z) 2 Keen, 555.

(a) And see *Sanders v. Ashford*, 28 Beav. 609, and *post*, p. 970, n. (g).

survivorship, the clause of survivorship, unless extended by particular words, attaches only to the original shares, and does not affect the accruing shares (b): But an exception to this rule has been admitted, where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happen to die (c).

shares pass
to the sur-
vivors :

In *Knight v. Gould* (d), a testatrix bequeathed the residue of her property "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them:" She then proceeded to nominate three persons to be her executors: One of them died in the lifetime of the testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that the whole residue vested in the two survivors: His Lordship, in giving his judgment, observed, that it was not necessary to decide whether these legatees took as joint-tenants, or as tenants in common; because it was clear on the construction of the Will, that the testatrix meant to give the residue to her executors as a class of persons in their official character: The learned judge added, it did not follow that a bequest of a residue to executors equally must, in all cases, be a gift to them in their representative capacity, and so survive to those who live to take the office (e).

to executors
in a class.

(b) See *Perkins v. Micklethwaite*, 1 P. Wms. 275; *Rudge v. Barker*, Cas. temp. Talb. 124; *Ex parte West*, 1 Bro. C. C. 575; *Vandergucht v. Blake*, 2 Ves. 534; *Barker v. Lea*, 1 Turn. & Russ. 415; *Crowder v. Stone*, 3 Russ. Chanc. Cas. 217; *Bright v. Rowe*, 3 Mylne & K. 316; *Rickett v. Guillemard*, 12 Sim. 88; *Macgregor v. Macgregor*, 2 Coll. 192; *Goodwin v. Finlayson*, 25 Beav. 65; *Evans v. Evans*, *ibid.* 81; *Re Chaston*, 18 C. D. 218.

(c) See *Pain v. Benson*, 3 Atk. 78; *Worldidge v. Churchill*, 3 Bro. C. C. 465; *Barker v. Lea*, 1 Turn. & Russ. 413, 415; *Eyre v. Marsden*, 2 Keen, 564; 4 My. & C. 231; *Sillick v. Booth*, 1 Y. & Coll. Ch. C. 121; *Leeming v. Sherratt*, 2 Hare, 14; *Doe v. Birkhead*, 4 Exch. 110; *Douglas v. Andrews*, 14 Beav. 347; *Dutton v. Crowdy*, 33 Beav. 272; *Re Crawhall's Trust*, 8 De G. M. & G. 480.

(d) 2 M. & K. 295.

(e) See *Barber v. Barber*, 3 My. & C. 688; *Re Gibson*, 2 Johns. & H. 656, where Wood, V.-C., said that, with the exception of *Knight v. Gould*, he knew of no case where a bequest to persons referred to in the Will by the terms "hereinbefore named," or "hereinafter named," or "hereinbefore mentioned," or "hereinafter mentioned," has been held to be a bequest to those persons as a class. See also *Hoare v. Osborne*, 33 L. J. Ch. 586.

In what cases a legacy in remainder, or by way of limitation over, will lapse by the death of the prior legatee in the lifetime of the testator.

It is necessary in this place to consider what effect the death of a prior legatee, in the lifetime of the testator, will produce on the interest of another legatee in remainder.

In the case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator (f). So, if a legacy be given to a person, with a limitation over, if he should die under twenty-one, or before the happening of any other event, and he dies, in the lifetime of the testator, under the prescribed age, or before such other event happens, the legacy over does not lapse (g).

But the rule is different where a legatee, to whom the legacy is given absolutely, with an executory limitation over, dies in the lifetime of the testator, *but after the event has happened, on the non-occurrence of which the limitation over depends*: for in such case every part of the bequest lapses.

Thus in *Calthorpe v. Gough* (h), a legacy was given to trustees, in trust for Lady Gough for life, and in case she should die in the lifetime of her husband, as she should appoint, and in default of appointment, to her children, but if she should survive her husband, then to her absolutely: She *survived her husband*, and died in the lifetime of the testator: And Lord

(f) *Hardwick v. Thurston*, 4 Russ. Ch. Cas. 383; *Lee v. Pain*, 4 Hare, 225. And it will make no difference that a power of appointment is given to the legatee for life: *Chatteris v. Young*, 6 Madd. 30. See also *Re Lowman*, [1895] 2 Ch. 348, *infra*.

(g) *Miller v. Warren*, 2 Vern. 207; *Ledsome v. Hickman*, 2 Vern. 611; *Willing v. Baine*, 3 P. Wms. 113; *Walker v. Main*, 1 Jac. & Walk. 1; *Humberstone v. Stanton*, 1 Ves. & Beam. 388; *Humphreys v. Howes*, 1 Russ. & M. 639; *Varley v. Winn*, 2 Kay & J. 700; *Re Gaitskell's Trusts*, L. R. 15 Eq. 386; *Ive v. King*, 16 Beav. 46, 54; in which last case, Romilly, M. R., said that the gift over in some of these cases takes effect upon the presumption that such ulterior legatee was substituted in order to prevent the lapse of the legacy. See also *Re Kirk*, 85 L. J. Ch. 182; *Re Green's Estate*, 1 Dr. & Sm. 68; *Hannam v. Sims*, 2 De G. & J. 151; in the latter of which cases it was held that the words "shall happen to die" included the case of the testator's brother named in the Will, but dead at the date of it, and that the gift in favour of his children took effect. See also *Re Sheppard's Trust*, 1 Kay & J. 269; *Barnaby v. Tassell*, L. R. 11 Eq. 363. Where there are in a Will successive limitations of personal estate in favour of several persons absolutely, the first of those who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken; the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift: *Re Lowman*, [1895] 2 Ch. 348, dissenting from dictum of Knight-Bruce, V.-C., in *Harris v. Davis*, 1 Coll. 416, 424, 425. See also *Andrew v. Andrew*, *ibid.* 690; *Re Dunstan*, [1918] 2 Ch. 304.

(h) 3 Bro. O. C. 394, note to *Doo v. Brabant*.

Alvanley held, that the legacy lapsed, and the children were not entitled. Again, in *Williams v. Jones* (*i*), a testator after bequeathing a sum of Long Annuities to his wife for life, gave the capital, after her death, to A., if he should be living at her decease, and if not, to A.'s son: A. *outlived the wife*, but died in the testator's lifetime: And it was holden that the legacy to A. lapsed, and that the gift to his son did not take effect (*j*). So in *Doo v. Brabant* (*k*), a legacy was given in trust for Sarah Counsell, until she attained the age of twenty-one, and then to pay the same to her; if she should die under twenty-one, leaving a child or children, then in trust for such child or children; but in case she should die under twenty-one, without having any child or children, then over to other persons: Sarah Counsell *attained twenty-one*, and married; but she died in the lifetime of the testator, leaving two children: And it was holden that the legacy lapsed, and the children were not entitled. So in *Humberstone v. Stanton* (*l*), there was a bequest to the son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he should die before he accomplished his apprenticeship, then and in such case to the other children: The legatee *lived to accomplish his apprenticeship*, but afterwards died in testator's lifetime: And it was holden that the legacy lapsed, and the bequest over could not take place; for the event which was to bar the claim of the brothers and sisters had happened (*m*).

Where there is a gift of a share of residue to an individual or a member of a class, with a direction for the settlement of the share, and such individual or member predeceases the testator, questions sometimes arise, whether by the expression "the share" is meant an aliquot part of the estate, or whether the share intended is that which would have come to the deceased beneficiary or member of the class had he survived (*n*). In the former case it would be caught by the direction to settle; in the latter it would lapse by the death of the legatee.

Effect of a direction for the settlement of a share.

(*i*) 1 Russ. Ch. C. 517.

(*j*) But see *Gaskell v. Holmes*, 3 Hare, 438.

(*k*) 3 Bro. O. C. 393.

(*l*) 1 Ves. & Beam. 384.

(*m*) As to cases where somewhat similar limitations over have been held to take effect, see *post*, Pt. III. Bk. III. Ch. II. § vi. p. 1014.

(*n*) *Re Roberts*, 30 O. D. 234; *Re Pinhorn*, [1894] 2 Ch. 276; *Re Powell*, [1900] 2 Ch. 525; *Re Whitmore*, [1902] 2 Ch. 66.

1 Vict. c. 26: gifts to children or other issue who leave issue living at the testator's death shall not lapse.

By stat. 1 Vict. c. 26, s. 33, "where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect, as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will."

This enactment does not substitute the issue for the deceased legatee, but gives the legacy to him absolutely as though he had survived the testator (*o*): and it is therefore disposable by the Will of the legatee (*p*).

Application of section.

This section of the Act applies to a testamentary appointment in the exercise of a general power (*q*). But it does not apply to a testamentary appointment made under a limited power (*r*). And it does not apply to gifts to a class (*s*): for the intention was to provide against lapse merely, and not to alter the construction to be put on the Will (*t*): And this is so even though in the events which happen the class should consist of but one individual (*u*).

Where after the testator's death a posthumous child was born to one of his children who had died before the testator, it was held that the section applied and that the share of such child passed under the latter's Will (*v*).

(*o*) *Re Hone's Trusts*, 22 O. D. 663. And thus estate duty is payable by the executor of the legatee as if he had survived the testator: *Re Scott*, [1901] 1 Q. B. 228.

(*p*) *Johnson v. Johnson*, 3 Hare, 157; *In the goods of Parker*, 1 Sw. & Tr. 523. It is doubtful whether such Will should be construed as if the legatee had survived the testator, or as if the testator had predeceased the legatee: *Re Mason's Will*, 34 L. J. 603. So where a father by his Will devised a freehold house to his son, and the son died in his father's lifetime leaving issue and having by his Will devised all his real estate to his father, it was held that the devise under the son's Will failed, and there was an intestacy in respect of it: *Re Hensler*, 19 O. D. 612. See also *Pickersgill v. Rodger*, 5 O. D. 163.

(*q*) *Eccles v. Cheyne*, 2 Kay & J. 676.

(*r*) *Griffiths v. Gale*, 12 Sim. 354; *Holyland v. Lewin*, 26 O. D. 236; *Re Griffiths*, [1911] 1 Ch. 246.

(*s*) *Ante*, p. 966; *Re Stansfield*, 15 O. D. 84.

(*t*) *Olney v. Bates*, 3 Drew. 319; *Browne v. Hammond*, Johns. 210. See also *Re More's Trust*, 10 Hare, 178.

(*u*) *Re Harvey's Estate*, [1893] 1 Ch. 567.

(*v*) *Re Griffiths*, *ubi supra*.

The section being inapplicable to collaterals, any attempt by Will to extend it to collaterals without a substitutionary gift to their legal personal representatives would be ineffectual (*w*).

In conclusion of this portion of the subject of lapse, it may be mentioned, that where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime (*x*). Legatee in trust.

2. Legacies lapsed by the death of the Legatee after the death of the Testator.

If a legacy be given generally, without specifying the time when it is to be paid, it is due on the day of the death of the testator (*y*), *though not payable till the end of a year next after the testator's death*. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death (*z*): Hence, if the legatee happen to die within the year, his personal representative will be entitled to the legacy. Where no period for payment is specified.

But when a future time for the payment of the legacy is defined by the Will, the legacy will be vested or contingent, according as, upon construing the Will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it (*a*). Where a future time for payment is appointed:

In ascertaining the intention of the testator in this respect, the Courts of Equity have established two positive rules of construction: 1st, That a bequest to a person *payable* or *to be paid* at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him

(*w*) *Re Gresley*, [1911] 1 Ch. 358; but see *Re Greenwood*, [1912] 1 Ch. 392.

(*x*) *Oke v. Heath*, 1 Ves. Sen. 84.

(*y*) Swinb. Pt. 7, s. 23, pl. 1.

(*z*) *Garthshore v. Chalie*, 10 Ves. 13. See *Collins v. Macpherson*, 2 Sim. 87.

(*a*) So where a testatrix bequeathed several legacies, and amongst others, one to a servant, if he should be residing with her at the time of her decease, but not otherwise: and she directed the said legacies to be paid *within* six months after her decease; and declared that the legacies should not be vested until payable; and the legatee died before the expiration of the six months; it was held that his representatives were entitled to the legacy: *Lucas v. Carline*, 2 Beav. 367. See also *Packham v. Gregory*, 4 Hare, 396, 397. Nevertheless the intention of the testator that his gift should not vest in the legatee until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or accident: *Law v. Thompson*, 4 Russ. Chanc. Cas. 92.

a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators: for the words "payable" or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time (b). 2nd, That if the words "payable" or "to be paid" are omitted, and the legacies are given *at* twenty-one, or *if, when, in case, or provided* the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for his payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy (c).

The Courts of Equity have adopted these rules from the established practice of the Ecclesiastical Courts (which in these matters had formerly concurrent jurisdiction) more in compliance with such practice than from any conviction of the soundness of the rules themselves.

Rule 1: where the bequest is immediate, and payment postponed, the legacy is vested.

As to the first rule, viz., that where the bequest is in terms immediate, and the payment alone postponed, the legacy is vested; it may be desirable, first, to give some cases illustrative of it, and then to point out certain exceptions to its application.

In *Jackson v. Jackson* (d), the testator bequeathed to his son 400*l.* *to be paid to him* at the end of one year next after his (the testator's) death, and the further sum of 100*l.* at the death of his mother: The son died before his mother: The question was, whether he took a vested interest in the 100*l.*: And Lord Hardwicke determined in the affirmative, observing, that the legacy of that sum was plainly vested, and the time of payment only postponed; for the former words "to be paid," were to be carried on, as they would clearly be, if turned into any other language.

In *Sydney v. Vaughan* (e), a legacy of 100*l.* was bequeathed to an apprentice, *to be paid to him* within six months after he

(b) Swinb. Pt. 7, s. 23, pl. 9; Godolph. Pt. 3, ch. 24, s. 25; *Shrimpton v. Shrimpton*, 31 Beav. 425. As to payment when legatee dies under age, see *post*, p. 1126.

(c) See *Hanson v. Graham*, 6 Ves. 245.

(d) 1 Ves. Sen. 217.

(e) 2 Bro. Parl. Oa. 254.

should have fully served out his apprenticeship: The legatee, instead of serving his time, ran away from his master and died intestate after the period of his apprenticeship expired: The Court of Great Sessions, on the Brecon circuit, decreed the legacy to his administrator, with interest from the end of six months after the expiration of the apprenticeship: And the House of Lords confirmed this decree.

In *Bolger v. Mackell* (f), the testatrix gave her residuary estate to Catherine, the daughter of James Winter, and to the lawful children of her (the testatrix's) brothers, John and James Snowden, in equal shares, the shares of the sons with the interest or accumulations *to be paid* at their ages of twenty-one, and of the daughters at twenty-one or marriage, after a deduction of what might be laid out for their maintenance and preferment in the world: John Snowden died without issue, but James died leaving two sons, neither of whom attained twenty-one: The question was, whether, notwithstanding that circumstance, two-thirds of the residue vested in them, so as to be transmissible to their legal personal representatives: and Lord Rosslyn was of opinion, that the two sons took vested interests, remarking, that the present was a mere bequest of the residue of personal estate, payable at twenty-one, so that the rule as to vesting must take place; which was not prevented by the addition of a direction that maintenance should be deducted (g).

It may here be observed, that a gift in terms which import a present vested interest, with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives (h).

The following exceptions to this rule may be remarked: 1st. The rule itself is always subservient to the intention of the testator: and, therefore, if upon construing the whole Will, it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee

Rule controlled by the intention of testator, apparent from the context:

(f) 5 Ves. 509.

(g) The rule is the same where a gift to children, &c., in a class is immediate, and the time of *division* only is postponed until they attain a certain age respectively: *Farmer v. Francis*, 2 Sim. & Stu. 505; *Kevern v. Williams*, 5 Sim. 171.

(h) *Blease v. Burgh*, 2 Beav. 226. "There is a strong, or I may say a stringent, rule that if we have words *clearly* making a vested gift, *clear* words are required to convert it into a contingent one": *per* James, L. J., in *Re Duke*, 16 O. D. 112, 114.

dies before the period of payment; although the words "to be paid" or "payable at" or other terms of immediate gift be employed in the Will (*i*).

This exception may be found in operation in cases where the testator has shown a clear intention that the legacies shall not vest till his debts are satisfied (*k*), or till his property has been sold or realized, and got in by his executors, or been laid out in a purchase: For if the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to *receive* it, there is no law against such intention, if clearly expressed (*l*).

But in these cases the intention of the testator, that the legacies shall not vest, must be expressed *with certainty* to prevent the operation of the general rule; for although the payment of the legacies be expressly postponed till the testator's debts be discharged, or till the sale of an estate be effected, or till after the residue of personal estate shall be laid out in the purchase of lands, yet the general rule that the gift is immediate, and the payment alone postponed, will operate; and the legacy will be transmissible, though the legatee died before the discharge of

(*i*) *Mackell v. Winter*, 3 Ves. 536; *Howes v. Herring*, 1 M'Clcl. & Y. 295; *Hunter v. Judd*, 4 Sim. 455.

(*k*) *Bernard v. Montague*, 1 Meriv. 422.

(*l*) It was said by Wood, V.-C., in *Martin v. Martin*, L. R. 2 Eq. 404, that the Court cannot give effect to a testator's intention that if a legatee should die before the property is actually received it should go over, but gives it to him absolutely: and Lord Selborne in *Minors v. Battison*, 1 App. Cas. 428, 452, says: "It was decided in *Hutcheon v. Mannington*, 1 Ves. 365, and *Martin v. Martin*, *ubi supra*, that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect." Jessel, M. R., however, in *Johnson v. Crook*, 12 C. D. 639, expressed his disapproval of *Martin v. Martin*, and asserted that the authorities prior to *Martin v. Martin* show that there is no law established that it cannot be done, only that it must be clearly expressed; and Fry, J., in *Re Chaston*, 18 C. D. 218, 227, says: "I believe all the earlier cases proceed simply on this inquiry, Is the contingency expressed with definite certainty?" It should be observed that, whichever of these views may be right, none of the cases go to show that the gift over is void for uncertainty where the words may be construed, not as referring to the time of actual payment and receipt, but to the time appointed for payment, or the termination of the period which the law usually allows for the payment of legacies, viz., twelve months from the testator's death. See the observations of Kindersley, V.-C., in *Re Arrowsmith's Trusts*, 29 L. J. Ch. 774, 777 (approved by Knight-Bruce, L. J.: S. C., on appeal, 2 De G. F. & J. 474) and of Fry, J., in *Re Collison*, 12 C. D. 834. See also *Re Goulder*, [1905] 2 Ch. 100, not following *Martin v. Martin*.

debts, or other event until which the payment is expressly postponed (*m*).

In the instances where this exception, by reason of the manifest intention of the testator, prevents the operation of the rule, it must be observed, that the legacies will, at all events, be considered vested at the period when the debts of the testator *might* have been paid, or the sale or purchase *might* have been effected, upon a due administration of the affairs of the testator: And a Court of Equity will inquire into what that period might have been; for that Court will not suffer the rights of legatees to be prejudiced by the fraudulent or unnecessary delay of executors or trustees (*n*).

Another exception to the rule may be stated to be: that if the event, upon which the legacy is directed to be paid, be uncertain as to its taking place, then the legacy becomes a conditional legacy, and will not devolve on the executors or administrators of the legatee, unless the condition be performed by the happening of the event (*o*).

*Dies incertus
conditionem
facit:*

Thus in *Atkins v. Hiccocks* (*p*), the bequest was of 200*l.* to Eliz. Hiccocks, to be paid at time of her marriage, or within three months afterwards, provided she married with the approbation of, &c.: The testator also gave to Elizabeth an annuity until that event took place: She died without ever having been married, after having attained the age of twenty-one: The question was, whether Elizabeth took such a vested interest in the legacy, as was transmissible to her administrator: And Lord Hardwicke determined in the negative; upon which occasion he remarked, that in the common cases of legacies to be paid at the age of twenty-one, there was a certain time fixed, not to the thing itself, but to the execution of it; and the time so fixed must necessarily arrive: But that when the time annexed to the payment was merely eventual, and might or might not come, and the person died before the contingency happened, his Lordship could find no instance where it had been decided that the legacy should be paid at all events.

(*m*) *Hutcheon v. Mannington*, 1 Ves. 365. See also *Bubb v. Padwick*, 13 O. D. 517. This case, however, has been disapproved in *Re Chaston*, 18 O. D. 218; *Minors v. Battison*, 1 App. Cas. 428; and *Re Goulder*, *supra*.

(*n*) *Re Dodgson's Trusts*, 1 Drewr. 440; *Re Arrowsmith's Trusts*, 2 De G. F. & J. 474, *per* Turner, L. J. See also *Re Chaston*, 18 O. D. 218; *Re Wilkins*, 18 O. D. 634.

(*o*) Swinb. Pt. 7, s. 23, pl. 10; Godolph. Pt. 3, c. 25, s. 25.

(*p*) 1 Atk. 500.

But this exception will not apply when it is apparent from the whole of the Will, that it was not the intention of the testator to make the legacy conditional: Thus in *Booth v. Booth* (q), the testator, having two great nieces, both of age, named Phoebe and Ann, devised the residue of his estate to trustees, in trust, to place it out at interest, and pay the annual produce to Phoebe and Ann, until their respective marriages, and immediately after their respective marriages, to assign to them respectively, their several shares: Phoebe, after surviving the testator, died without ever being married: And the question was, whether, notwithstanding Phoebe never married, she took a vested interest in her moiety, which was transmissible at her death to her personal representatives, one of whom was her sister Ann; Lord Alvanley held, on the ground of the bequest being a residue (r), and given to persons of maturity, as also upon the words of the devise, that the case was one where the maxim *dies incertus conditionem facit* could not be applied; and that Phoebe took a vested interest in her share, to which Ann, as her residuary legatee, was immediately entitled, although Ann could not claim her original share previous to her own marriage. So a bequest to a daughter on marriage with interest in the meantime is vested (s).

2nd Rule:
a legacy given
"at," "if,"

It remains to consider the other positive rule on this subject: viz., that if the words "payable" or "to be paid," are omitted,

(q) 4 Ves. 399. See the observations of Stuart, V.-O., on this case in *West v. West*, 4 Giff. 201.

(r) See also *Jones v. Mackilwain*, 1 Russ. Chan. Cas. 223. There has always been a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with respect to any part of the testator's property: by Sir W. Grant in *Leake v. Robinson*, 2 Meriv. 386. See also *Leeming v. Sherratt*, 2 Hare, 23, by Wigram, V.-O., citing *Love v. L'Estrange*, 5 Bro. P. O. 59, Toml. edit.; *Pearman v. Pearman*, 33 Beav. 396. However, in *Addison v. Busk*, 14 Beav. 461, 462, Romilly, M. R., said he could not give to the same words a different construction when used in relation to a residue from that which he should when applied to a simple legacy.

(s) *Vize v. Stoney*, 1 Dr. & Warr. 337. See also *West v. West*, 4 Giff. 201; *Lang v. Pugh*, 1 Y. & Coll. Ch. C. 718. So in *Re Wrey*, 30 C. D. 507, a testatrix by her Will, after specific bequests of bonds, gave all the rest of her stocks and shares upon trust to pay the income to her nephew G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him: and it was held that G. took a vested interest under the gift, and being of age was entitled to have the stocks and shares comprised therein transferred to him, although he had not married. Cf. *Re Bunn*, 16 C. D. 47; *Scotney v. Lomer*, 29 C. D. 535; 31 C. D. 380; *Re Gossling*, [1903] 1 Ch. 448.

and the legacy is given *at* twenty-one, or *if, when, in case, or provided*, the legatee attains twenty-one, or "*on*" his attaining that age, or any other future definite period, this confers on him a contingent interest, which depends for its vesting, and its transmissibility to his executors or administrators, on his being alive at the period specified.

"when,"
"in case,"
"provided,"
the legatee
attains
twenty-one,
&c., or "on"
attaining
that age, is
contingent:

In *Onslow v. South* (*t*), the testator being possessed of considerable personal estate in Jamaica and in England, bequeathed as follows: "I give to J. S. now under the custody of R. D. 2,000*l.* at the age of twenty-one years, to be paid by my executors in England:" J. S. died under the age of twenty-one, but having attained the age of eighteen, he bequeathed this legacy to the defendant South, the validity of which disposition depended upon the question, whether J. S. took a vested interest in the money before the age of twenty-one. And the Lord Chancellor determined that the legacy did not pass to the defendant; since J. S.'s interest in it was not vested, but contingent; and his lordship remarked, that the word "now" was merely descriptive of the condition of the legatee; and that the word "paid" was only applicable to the persons by whom the money was to be satisfied.

So in *Cruse v. Barley* (*u*), the testator gave to his son 200*l.* at his age of twenty-one: The son died under twenty-one: And it was determined that the legacy never vested in him; as the age was annexed to the gift and not to the payment; and, consequently, his personal representative could not be entitled to the money.

In *Smell v. Dee* (*x*), the bequest was of "100*l.* a-piece to the two children of J. S. at the end of ten years next after my decease:" The legatees died before the expiration of the ten years: And Lord Cowper held the legacies to be extinct: and said, "that wherever the time is annexed to the legacy, and not to the payment of it (as in the present case), if the legatee die before the day of payment, the legacy is lapsed" (*y*).

In *Stapleton v. Cheales* (*z*), it was clearly held, that the ex-

"if,"
"when:"

(*t*) 1 Eq. Cas. Abr. 295, pl. 6.

(*u*) 3 P. Wms. 20.

(*x*) 2 Salk. 415.

(*y*) See also accord., *Bruce v. Charlton*, 13 Sim. 65, 68.

(*z*) Prec. Chanc. 317. The expressions "if" and "when" will generally receive the construction given them in this case, when standing alone and unaffected by preceding or subsequent context: *Re Francis*, [1905] 2 Ch. 295; *Re Kirkley*, 87 L. J. Ch. 247; but the

pressions "at twenty-one," or "if," or "when he shall attain twenty-one," were all one and the same, and in each of those cases, if the legatee died before that age, the legacy lapsed. This is fully confirmed in *Hanson v. Graham* (a) by Sir W. Grant, who observed that in the civil law the words "*cum*" and "*si*," as referred to this subject, are precisely equivalent; and from that law we borrow all, or at least the greatest part of our rules upon legacies (b).

"on :"

Again it was held in *Re Wrangham's Trust* (c), that a gift to legatees *on* their attaining the ages of twenty-one is a contingent and not a vested gift.

"provided :"

In *Atkinson v. Turner* (d), the testator gave two-thirds of three-eighths of his joint-stock and trade to his grandson,

context frequently shows that the words "if," "when," "as soon as," must be construed not to import contingency in the sense of condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of an estate vested. Thus in *Andrew v. Andrew*, 1 O. D. 410, a testator by a Will dated in 1832 devised lands to F. A. for life, and from and after the decease of F. A. to his eldest son if he should have arrived at the age of twenty-one years, and, in default of his having a son, then over. F. A. died leaving an eldest son, a minor. It was held by the Court of Appeal that on the death of F. A. the eldest son took an estate in fee, liable to be divested on his dying under twenty-one. In thus construing the word "if" as not importing a contingency, Lord Justice James placed great reliance on the fact that the gift was in the Will expressed to be "from and after" the death of the tenant for life, saying that to construe the word "if" as contingent one would have to strike the words "from and after" out of the Will. North, J., however, in the case of *Re Jobson*, 44 O. D. 154, in a Will in which the words were "and from and after her (the tenant for life) decease the premises shall be in trust for all her children, in equal shares as tenants in common, on their respectively attaining the age of twenty-one years," declined to give this effect to the words "from and after," and held that the children did not take vested interests till they attained the age of twenty-one. But in this case there was no gift over in default of the tenant for life having a son, nor would the infant son lose the benefit of the income during his minority, as he would have done in *Andrew v. Andrew*, had the Court of Appeal come to a different conclusion. "There is no indication," says North, J., at p. 158, speaking of *Andrew v. Andrew*, "that the Court would have arrived at the same conclusion had there been nothing more in the Will than the words 'from and after.'"

(a) 6 Ves. 243, 245.

(b) In the case of *May v. Wood*, 3 Bro. C. C. 473, 474, Lord Alvanley broadly laid down a different doctrine. But Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 243, demonstrates that the principle on which his lordship proceeded was an erroneous one. See also *Lane v. Goudge*, 9 Ves. 230; and the observations of Lord Brougham, in *Phipps v. Ackers*, 3 O. L. & Fin. 700, 715.

(c) 1 Dr. & Sm. 358; *Re Edwards*, [1906] 1 Ch. 570.

(d) 2 Atk. 41. See also *Watson v. Hayes*, 5 My. & C. 125, 132, 133; *Young v. Macintosh*, 13 Sim. 445.

provided he should attain the full age of twenty-one, with remainder over if he did not live to that period: The grandson died under twenty-one; and the question was, whether his administrator was entitled to the profits which accrued from the death of the testator to the infant's decease; which depended upon the circumstance whether he took a vested interest in the legacy during minority: And the Master of the Rolls determined in the negative; considering, that by the words of the Will, nothing vested in the legatee, since he did not attain the age of twenty-one (*e*).

In *Elton v. Elton* (*f*), where a testator gave to his granddaughter 1,500*l.* to be at her disposal, *in case* she married with consent, &c., Lord Hardwicke held, that marriage was a condition precedent to the vesting of the legacy: observing, that whether the testator said, "in case she marry, I give," or, "I give, in case she marry," made no difference; for in both instances marriage is annexed to the substance of the devise.

It is to be observed with reference to all these words which would seem *primâ facie* to create a contingent and not a vested interest, such as "if," "when," "or," "provided," "in case," that the inference is only *primâ facie*, and liable to be ousted by the context or the inferences to be drawn from the Will as a whole (*g*).

Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected (*h*).

"in case:"

Direction to transfer "from and after," or "to divide and pay at," a future period, without any previous gift:

(*e*) But see *Simmonds v. Cocks*, 29 Beav. 455, which was a case of a devise and bequest of real and personal estate to several persons, their respective heirs, executors, administrators and assigns, in remainder after a life estate, the gift to one of the remaindermen (who was an infant) being qualified by the words "provided she lives to attain twenty-one:" and it was held that the proviso was a condition subsequent.

(*f*) 3 Atk. 504; *Knight v. Cameron*, 14 Ves. 389; *Re Kirkley*, 87 L. J. Ch. 247.

(*g*) See *Simmonds v. Cocks*, 29 Beav. 455; *Bree v. Perfect*, 1 Coll. 128; *King v. Isaacson*, 1 Sm. & G. 371.

(*h*) *Leake v. Robinson*, 2 Meriv. 363, 387; *Booth v. Booth*, 4 Ves. 399; *Ford v. Rawlins*, 1 Sim. & Stu. 328; *Jones v. Mackilwain*, 1 Russ. Chanc. Cas. 223; *Vawdry v. Geddes*, 1 Russ. & M. 203; *Murray v. Tancred*, 10 Sim. 465; *Watson v. Hayes*, 5 My. & O. 125, 133; *Davies v. Fisher*, 5 Beav. 201, 209, *per* Lord Langdale; *Beck v. Burn*, 7 Beav. 492; *Chevaux v. Aislabie*, 13 Sim. 71; *Walker v. Mower*, 16 Beav.

This doctrine, in fact, only assimilates the gift of a legacy under the form of a direction to pay or divide at a future time, or on a given event, to the instance already considered of a simple and direct bequest of a legacy *at* a like future time, or a like event (*i*): And it is plainly inapplicable where a Will contains a direct gift, independently of the direction to pay at a future period to the legatee; as where such direction is followed by the words, "to whom I give and bequeath the same accordingly" (*k*).

First excep-
tion to 2nd
Rule:
gift of interim
interest:

It may now be proper to ascertain the exceptions to this latter rule. 1st. Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit, the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should at all events have the principal, and on this ground holds such legacies to be vested (*l*).

Thus in *Fonereau v. Fonereau* (*m*), the bequest was of 1,000*l.* to Claudius Fonereau, *when* he should have attained the age of twenty-five: The testator empowered his executors and trustees to place the money at interest, which he directed to be applied at their discretion for the education of Claudius, as also

365; *Shum v. Hobbs*, 3 Drewr. 93; *Laxton v. Eedle*, 19 Beav. 321; *Adams v. Robarts*, 25 Beav. 653. But see *Leeming v. Sherratt*, 2 Hare, 14, 17, 21; *Packham v. Gregory*, 4 Hare, 396, 397, 398; 7 Hare, 228; *Re Minor's Trusts*, 28 Beav. 50.

(*i*) *Leeming v. Sherratt*, 2 Hare, 14, 18.

(*k*) *Re Bartholomew*, 16 Sim. 585; affirmed on appeal, 1 Mac. & G. 354. See also *Smith v. Palmer*, 7 Hare, 228, 229, by Wigram, V.-O., *Williams v. Clark*, 4 De G. & Sm. 472, 473, 474.

(*l*) *Fearne*, Cont. Rem. 553, note by Mr. Butler; *Re Gosling*, [1903] 1 Ch. 448. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property: By Sir J. Leach in *Vawdry v. Geddes*, 1 Russ. & M. 208. See also *Saunders v. Vautier*, 1 Cr. & Ph. 248, by Lord Cottenham; cf. *Re Wrey*, 30 C. D. 507, and *Re Jobson*, 44 C. D. 154, in which case it was held on the terms of that Will that there was no clear separation of the fund from the rest of the estate, nor any express appropriation of it, and therefore no presumption of an immediate gift. It has been said that the presumption of an immediate gift, from the circumstances of the interim interest being given, fails entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period: by Sir J. Leach, in *Vawdry v. Geddes*, 1 Russ. & M. 208. But see *contra*, Jarman on Wills, 6th edit., 1426, and also *Davies v. Fisher*, 5 Beav. 201, 213. The above proposition as to the effect of the gift over as negating the presumption of an immediate gift arising from the gift of interim interest seems to be recognised by Kay, J., in *Re Wrey* (*ubi supra*), 507, 509.

(*m*) 3 Atk. 645.

part of the principal to put him apprentice, and the remainder to be paid to him when he should have attained the age of twenty-five, and not before; Claudius having died under that age, the question was, whether his personal representative was entitled to the legacy; which depended on this, whether he took a vested interest: And Lord Hardwicke decided in the affirmative.

In *Hoath v. Hoath* (n), the testator gave 100*l.* to Thomas Hoath at the age of twenty-one, and directed the intermediate interest to be paid to his mother for his maintenance: Thomas having died under twenty-one, the question was whether this was a vested legacy: And Lord Thurlow determined in the affirmative, in consequence of the interest having been given for the benefit of Thomas, before his legacy became payable.

In *Hanson v. Graham* (o), the testator bequeathed to his three grandchildren 500*l.* a-piece, four per cent. consols, *when* they should respectively attain the age of twenty-one or be married, providing the marriages were had with the consent of his executors and trustees; and he directed the interest of the annuities to be laid out, at the discretion of his executors and trustees as they should think proper, for the benefit of the legatees, until they attained twenty-one or married, and for no other use, intent, or purpose: The testator then gave his residuary personal estate to his son Isaac Graham, whom he appointed executor: One of the grandchildren died intestate at the age of nine years, after surviving the testator; and the question was, whether the plaintiffs, its next of kin, or the residuary legatee of the testator, were entitled to the legacy;

(n) 2 Bro. O. C. 4.

(o) 6 Ves. 239. It will be observed that in this case there was a bequest to *each child* of 500*l.* In *Re Hunter's Trusts*, L. R. 1 Eq. 295, Wood, V.-O., points out that the principle of *Hanson v. Graham* has no application where the income of a fund is given as a common fund towards maintenance and education of members of a class during infancy, and there is no division of the property until a future date or future event. This case seems to account for the suggestion of James, V.-O., in *Re Ashmore's Trusts*, L. R. 9 Eq. 99, 102, which Jessel, M. R., in *Fox v. Fox*, L. R. 19 Eq. 286, 290, seemed to think was without authority. The principle stated in *Re Gossling*, [1902] 1 Ch. 945, and approved by the Court of Appeal, [1903] 1 Ch. 448 (although the decision was reversed on construction), is that, where a testator gives his residue to several persons on their attaining twenty-one, and directs the income during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested; *secus*, if the direction be to apply the income of the respective shares of *each* for his or her maintenance. See also *Re Turney*, [1899] 2 Ch. 739; and *post*, p. 984, n. (t).

which depended upon this circumstance, whether the deceased grandchild took a vested interest in it: And Sir W. Grant determined in favour of the plaintiffs, the next of kin, upon the principle, that the gift of the whole interest for the benefit of the legatees, which gave them the absolute property in it, as it became due, also gave them immediate vested interests in the legacies, and consequently that the next of kin of the deceased grandchild were entitled to the 500*l.* bequeathed to it (*p*).

Postponement
of vesting
may be
controlled by
direction to
pay interest
for benefit of
legatee:

Accordingly, it is an established doctrine, that directions to pay or divide, &c., at a future time, or on a given event, which, as it has already been shown (*q*), of themselves import a postponement of the vesting, may be so controlled by a direction to apply the interest for the benefit of the legatee, as to postpone payment or possession only, and not the vesting (*r*).

In *Davies v. Fisher* (*s*), a gift of personalty to trustees for A. for life, and after his death, in trust for the children of A., “as they severally attained twenty-five years,” the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child should live to attain twenty-five, was held by Lord Langdale to be vested, notwithstanding the interval between the twenty-first and twenty-fifth year of each child, during which there was no direction as to the application of the interest (*t*).

(*p*) For examples of the above exception to the rule, see *Lane v. Goudge*, 9 Ves. 229; *Murray v. Addenbrook*, 4 Russ. 407; *Stephens v. Frost*, 2 Y. & C. 302; *Vivian v. Mills*, 1 Beav. 315; *Vize v. Stoney*, 1 Dr. & Warr. 337; *Parker v. Golding*, 13 Sim. 418; *Lister v. Bradley*, 1 Hare, 10, 13; *Hobbs v. Parsons*, 2 Sm. & G. 212; *Re Grove's Trusts*, 3 Giff. 575; *Shrimpton v. Shrimpton*, 31 Beav. 425; *Bird v. Maybury*, 33 Beav. 351; *Re Hart's Trusts*, 3 De G. & J. 195; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *Fox v. Fox*, L. R. 19 Eq. 286; *Re Bunn*, 16 O. D. 47; *Re Wrey*, 30 C. D. 507; *Scotney v. Lomer*, 31 C. D. 380.

(*q*) *Ante*, p. 981. But see also *post*, p. 991, note (*m*), and p. 992, note (*p*).

(*r*) *Parker v. Golding*, 13 Sim. 418; *Milroy v. Milroy*, 14 Sim. 48; *Hammond v. Maule*, 1 Coll. 281; *Harrison v. Grimwood*, 12 Beav. 192; *Leeming v. Sherratt*, 2 Hare, 14; *Packham v. Gregory*, 4 Hare, 396; *Tatham v. Vernon*, 29 Beav. 605; *Boulton v. Pilcher*, *ibid.* 633; *Pearman v. Pearman*, 33 Beav. 394; *Re Peek's Trusts*, L. R. 16 Eq. 22. This doctrine only applies where there is one gift of principal and interest, and the possession of the principal is postponed, and does not apply where the interest alone is the subject of gift up to a particular time, and the principal is then for the first time given; for in such case the prior gift of the interest or dividends will not vest the principal: *Spencer v. Wilson*, L. R. 16 Eq. 501; *Watson v. Hayes*, 9 Sim. 500; *revd.* 5 M. & C. 124. See *post*, p. 936.

(*s*) 5 Beav. 201.

(*t*) See also *Milroy v. Milroy*, 14 Sim. 48, and compare *Lloyd v. Lloyd*, 3 K. & J. 20; *Re Grove's Trusts*, 3 Giff. 575; *Re Lodwig*,

But, generally speaking, if the gift of maintenance be not co-extensive with the whole amount of the interest (*u*), or if

[1916] 2 Ch. 26. It will be seen that the difference between *Davies v. Fisher*, *ubi supra*, and *Lloyd v. Lloyd*, *ubi supra*, which resulted in the gifts being held vested in the one case by reason of the gift of the income for maintenance during minority and not in the other, is that in the former case the gift was to the individuals "as they severally attained twenty-five years," whereas in the latter case the gift was to a class from which individuals, not attaining the prescribed age, would be excluded. In *Fox v. Fox*, L. R. 19 Eq. 286, Jessel, M. R., held that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose. There, however, the fund was divided into as many shares as the son had children, and the income of each share was directed to be applied for the maintenance of the particular child for whom the share was destined; but see *Re Hume*, [1912] 1 Ch. 693, where the power to apply income was discretionary. And see *Re Campbell*, 88 L. J. Ch. 239. But in *Re Parker*, 16 O. D. 44, Jessel, M. R., says: "It appears to me that this case is different from that of *Fox v. Fox*, L. R. 19 Eq. 286. In my opinion when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and, not the less so, when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit:' but I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age." This was followed and applied in *Re Mervin*, [1891] 3 Ch. 197, and *Re Williams*, [1907] 1 Ch. 180. Cf. *Re Gosling*, [1902] 1 Ch. 945; [1903] 1 Ch. 443, *ante*, p. 983, n. (o). In *Dewar v. Brooke*, 14 O. D. 529, in which case a testator directed his trustees to hold the trust fund for all his children, or any his child, who, being sons or a son, should attain twenty-five, or being daughters or a daughter, should attain twenty-one or marry, and if more than one in equal shares, to be divided and paid on the youngest of his said children attaining twenty-one, and empowered his trustees to apply the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child, it was held upon a petition by a son presented after the youngest child (a daughter) had attained twenty-one, but before he himself had attained twenty-five, that his interest under the Will was not vested but contingent on his attaining twenty-five, and Hall, V.-C., distinguished *Fox v. Fox*, *ubi supra*, on the ground that in that case the trust was not for children who attain a prescribed age, but for sons as and when they attain a prescribed age, and that the division as well as the payment was not postponed as in *Dewar v. Brooke*. Cf. also *Re Grimshaw's Trusts*, 11 O. D. 406. In *Re Wintle*, [1896] 2 Ch. 719, North, J., considered the decisions in *Fox v. Fox* and *Dewar v. Brooke* inconsistent, and dissented from *Fox v. Fox*, holding that by the phrase, "the whole, or such part as they or he shall think fit," did not mean the whole of the income in any event. But see *post*, note (*u*).

(*u*) *Pulsford v. Hunter*, 3 Bro. C. C. 416; *Hanson v. Graham*, 6 Ves. 239, 249; *Leake v. Robinson*, 2 Meriv. 386, 387; *Vawdry v.*

it be made out of another fund, in neither case will the legacies vest, prior to the arrival of the periods at which they are made payable: for such provisions afford no presumption that the testator intended the legacies to vest before they became due.

Again, in the cases above cited, the *corpus* of the property was given with a postponement of the payment, and the interest or fund directed to be applied or managed for the benefit of the legatee: But it has been laid down, that the exception will not

Geddes, 1 Russ. & M. 203; *Watson v. Hayes*, 5 My. & C. 124; *Re Ashmore's Trusts*, L. R. 9 Eq. 99; *Thomas v. Wilberforce*, 31 Beav. 299; *Re Sanderson's Trusts*, 3 K. & J. 497, 504; *Re Andrew's Trust*, [1905] 2 Ch. 48. This is because it is the giving of the interest and not the giving of the maintenance which is held to effect the vesting. See *per* Lord Cottenham in *Watson v. Hayes*, 5 My. & C. 125, 133. The giving of the whole interest is in effect a direction that the legacy shall carry interest: *Re Hart's Trusts*, 3 De G. & J. 195, 200, 202. And a legacy payable at a prescribed age with interest in the meantime vests immediately. See *ante*, p. 982. In order, however, that an inference of an immediate gift of the principal may be drawn from a direction that the whole income be applied to maintenance, it is necessary that there should be a first gift of the capital fund itself, and not merely of income. See *Spencer v. Wilson*, L. R. 16 Eq. 501; *Re Grimshaw's Trusts*, 11 C. D. 406; for there is an obvious difference between a gift of the interest for maintenance and a gift of maintenance out of the interest. If, however, there be a gift of the *corpus* to individuals or a class payable at a future time, coupled with a direction to apply the *whole* income to maintenance of the individual or the members of the class, the inference that the gift is vested does not the less arise because there is a discretion conferred on the trustees to apply less than the whole income to that purpose. See *per* Jessel, M. R., in *Fox v. Fox*, 19 Eq. 286, and also *Harrison v. Grimwood*, 12 Beav. 192, which, however, has not always been accepted as an authority. See Hawkins on Wills, p. 229. It would seem from the cases of *Pulsford v. Hunter*, 3 Bro. C. C. 416, and *Re Ashmore's Trusts*, L. R. 9 Eq. 99, that a gift even of the whole income of a fund for maintenance does not necessarily give rise to a presumption of a vested interest in the principal. See, however, the observations on these cases of Jessel, M. R., in *Fox v. Fox*, *ubi supra*, and compare therewith the judgment of Hall, V.-O., in *Re Grimshaw's Trusts*, *ubi supra*. Notwithstanding that North, J., dissented from *Fox v. Fox* in *Re Wintle*, [1896] 2 Ch. 719 (*supra*, n. (t)), Lindley, M. R., in *Re Turney*, [1899] 2 Ch. at p. 747, said: "I am by no means satisfied that *Fox v. Fox* was wrongly decided. So far as I have considered it, my impression is that the decision is very good sense and very good law." But the attention of the Court of Appeal seems to have been drawn only to the distinction taken by North, J., in *Re Wintle*. Sir G. Jessel himself distinguished *Re Parker* (*supra*, n. (t)) from *Fox v. Fox* in a way which implies that the rule he is supposed to have laid down in the latter case is too wide. See *per* Swinfen Eady, J., in *Re Gossling*, [1902] 1 Ch. at p. 947, and *ante*, p. 935, n. (t). The result of the comparison would seem to be that no absolute rule of construction arises on a direction to apply the whole income for maintenance "at the discretion of trustees or otherwise," but in each case the whole frame of the Will must be looked at to ascertain whether the gift is of the interest for maintenance or a gift of maintenance out of interest.

apply where the interest or dividends alone are the subject of bequest until a particular time, and the principal is not sooner taken out of the residue, but directed for the first time to be taken out of it, and paid or transferred to the legatee, *at the end of that period*: because the gift and payment of it are one and the same, and it was the intention of the testator to make the gifts of the interest and the capital separate and distinct, so as to constitute the time appointed for payment of the principal the very essence of the gift of it (x).

It must further be remarked, with respect to this exception, that a contingent gift of the interest will not vest the principal: Thus a legacy to A., as soon as she attains twenty-one, *with interest*, is contingent (y). But a bequest by a testator of one-third of his personal estate to his daughter, and in case of his decease, to have the interest therein and principal when she attained the age of twenty-five, was held to give a vested interest to the daughter, though she died under that age (z).

And it should be here observed, that there is an important distinction between a case where the legacy is to be severed *instantly* from the general estate, for the use and benefit of the legatee, and a case where a legacy is to be severed from the estate only upon the happening of a particular event. Thus in *Saunders v. Vautier* (a), a testator bequeathed to his executors or trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V. his executors, administrators or assigns, absolutely: The Will

Where there is an absolute vested gift payable at a future time, a direction to accumulate the income in meantime and pay it with the principal will not be enforced.

(x) This statement of the principle of the cases was approved of, and acted upon, by Alderson, B., in *Cromek v. Lumb*, 3 Younge & O. 576. See *ante*, p. 984, note (r); *Batsford v. Kebbell*, 3 Ves. 263. This case has been sometimes cited to show that a future gift expressed in the terms "pay and distribute," is contingent by force of the expressions only: But this is not so; the judgment proceeded emphatically on the ground that the subject of the future gift was not the same as, but different from, the previous gift for life: *Smith v. Palmer*, 7 Hare, 228, by Wigram, V.-O. See also the comments of Kindersley, V.-O., on this case in *Westwood v. Southey*, 2 Sim. N. S. 198, 200, and of Kay, J., in *Re Wrey*, 30 O. D. 507, 510.

(y) *Knight v. Knight*, 2 Sim. & Stu. 490; *Re Kirkley*, 87 L. J. Ch. 247.

(z) *Breedon v. Tugman*, 3 M. & K. 289.

(a) 1 Or. & Ph. 240. The principle is that, where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation, since no person has any interest in it but the legatee: *Wharton v. Masterman*, [1895] A. O. 186.

also contained a residuary bequest: The testator had 2,000*l.* India stock standing in his name at his death: And it was held by Lord Cottenham, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and accordingly the Court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one: And his Lordship observed that there was not only a gift of the intermediate interest, but a positive direction to separate the legacy from the estate, and to hold it in trust for the legatee when he should attain twenty-five (b).

Second exception to second rule where a previous estate is given to another.

A second exception to the latter rule (c) is, that where a person bequeaths a sum of money or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested: and his personal representatives will be entitled to the property, though he dies in the lifetime of the person to whom the property is bequeathed for life (d).

Thus, in *Monkhouse v. Holme* (e), the testator gave 830*l.* to trustees, to pay to his wife the interest for life, and from and after her death he disposed of the sum of 800*l.* in manner following, &c.: Then the testator, after several intermediate devises and bequests, gave the legacy, upon which the question

(b) See also *Greet v. Greet*, 5 Beav. 123; *Lister v. Bradley*, 1 Hare, 10; *Dundas v. Murray*, 1 Hemm. & M. 425; *Oddie v. Brown*, 4 De G. & J. 179, 194; *Pearson v. Dolman*, L. R. 3 Eq. 315; *Scotney v. Lomer*, 31 C. D. 380; *Re Bevan's Trusts*, 34 C. D. 716; *Re Nunburnholme*, [1912] 1 Ch. 489. And cf. *Re Jobson*, 44 C. D. 154, 160, in which case there was held to be no separation. But the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) is not sufficient to vest the legacy: *Festing v. Allen*, 5 Hare, 575, 578.

(c) I.e., the rule stated *ante*, p. 978, as extended by the doctrine of *Leake v. Robinson*, *ante*, p. 981.

(d) *Fearne*, Cont. Rem. 554, note. And it is immaterial whether the testator uses words of remainder, or whether the future gift is expressed in a direction to pay and distribute: *Smith v. Palmer*, 7 Hare, 228, by Wigram, V.-C. See also *King v. Isaacson*, 1 Sm. & G. 371. In *Re Duke*, 16 C. D. 112, it was held that the interest of children taking after the determination of prior life estates to the father and mother was not made contingent by a direction in the Will that the investment of the fund should not be altered until the period arrived "for its distribution (after their death) among their children surviving, share and share alike": since the words of the gift, in the first place, taken alone, clearly conferred immediately vested interests on all the children, and the subsequent clause amounted only to a direction that the fund was not to be disturbed till the period of distribution. Clear words are required to convert a vested into a contingent gift.

(e) 1 Bro. C. C. 298.

arose: "I also give to Jonathan Monkhouse, son of my brother George, the sum of 100*l*." Jonathan having survived the testator, died before the widow; and the question was whether he took a vested interest in the legacy so as to transmit it to his personal representatives: And Lord Rosslyn decided in the affirmative; his Lordship remarking that the 800*l*. was given to the trustees to pay the interest to the wife for life, and then in parts and shares; which showed that the testator intended to give vested interests to the several legatees.

So in *Blamire v. Geldart* (f), the testator gave to George Pringle 200*l*. three per cent. Consols, at his wife's decease, and appointed her, Pringle, and another person executors, to manage the property and fulfil the intentions of his Will: Pringle, the legatee, died before the wife; and the question was, whether he took a vested interest in the Consols, which entitled his personal representative to a transfer of them, the testator's widow being dead: and Sir W. Grant, M. R., determined in the affirmative, and thus expressed himself: "If the testator had given the stock to his wife for life, and at her death to Pringle, it would have been clear that he would have a vested interest in the nature of a remainder: In a Will, it is not material in what order the clauses are arranged: The question is, what is the effect upon the whole: This testator begins by giving to Pringle the stock at the death of his wife, and then gives to his wife the whole of his property: Consequently, she has a life interest in that stock so given to Pringle at her death; for it is part of the testator's property not antecedently disposed of: Thus the Will, no matter in what order, divides the fund between these two persons; giving to one the interest for her life, and to the other the capital at her decease; in effect and substance Pringle took a remainder, which became vested immediately upon the testator's death, and was not defeated by his own death in the lifetime of the wife" (g).

Within the principle of this exception may be considered the

(f) 16 Ves. 314.

(g) See further on the subject of this exception, *Scurfield v. Howes*, 3 Bro. C. C. 90; *Taylor v. Langford*, 3 Ves. 119; *Wadley v. North*, 3 Ves. 364; *Hallifax v. Wilson*, 16 Ves. 168; *Walker v. Main*, 1 Jac. & Walk. 1; *Kimberley v. Tew*, 4 Dr. & Warr. 139; *Butterworth v. Harvey*, 9 Beav. 130; *Packham v. Gregory*, 4 Hare, 396; *Salmon v. Green*, 11 Beav. 453; *M'Lachlan v. Taitt*, 2 De G. F. & J. 449; *Strother v. Dutton*, 1 De G. & J. 675; *Re Bright's Trusts*, 21 Beav. 67; *Partridge v. Baylis*, 17 C. D. 835.

cases, where the fund, which is the subject of the legacy, is given, not as in cases within the first exception, for the benefit of the legatee himself, but to another person beneficially, till the legatee arrive at a particular age, as till he attains twenty-one: or for a certain purpose, as till a certain quantity of debt be paid: These bequests mean to give all to a particular person, but to carve out a certain interest to endure a certain time, merely by way of exception: out of the whole property meant to vest in the legatee (*h*).

In these instances the person to whom the absolute property is limited will take an immediate vested interest in the subject; since such bequests are in the nature of remainders; the rule as to which is, that the interests of the first and subsequent takers vest together (*i*).

But this exception will not apply in cases where the principal itself is not bequeathed, but the *interest only* or income is given to a person for life, or some other period, and at the decease of the first taker, or the end of the period, the *capital* is bequeathed to another, and *where it appears from the context of the Will*, that *no interest in the capital was intended to pass till the determination of the life estate*, or other particular period: for in such cases the gift of the income and the gift of the capital are considered as distinct gifts; and when the legatee of the principal dies during the preceding period, the legacy is not transmissible to the executors or administrators (*k*).

Thus, in *Billingsley v. Wills* (*l*), the testator gave to his brother, Capel Billingsley, the *interest* of 1,500*l.*, for life, and from and after his decease, he gave the *said sum* of 1,500*l.* to all the younger sons, and to all the daughters of Capel, equally, to be paid to them at their ages of twenty-one; declaring, that no elder son, if there should be more than one son, nor any elder daughter, if there were only daughters of Capel, living at his death, should have any share or interest in the 1,500*l.*: But if all the children of Capel, except one, died before twenty-one, then he gave 1,000*l.*, part of the 1,500*l.*, to such surviving only child, to be paid at twenty-one: Capel had three children when

(*h*) *Boraston's Case*, 3 Co. 21; *Phipps v. Ackers*, 9 Cl. & F. 583, 591; *Lane v. Gouge*, 9 Ves. 230, by Sir William Grant; *Parkin v. Knight*, 15 Sim. 83; *post*, p. 994, note (*a*).

(*i*) See *Balmain v. Shore*, 9 Ves. 507.

(*k*) *Fearne*, Cont. Rem. 554, note.

(*l*) 3 Atk. 219.

the Will was made, and another child after the testator's death: Letitia, one of the three children, married and attained twenty-one, but died before her father: The question was, whether she, having attained twenty-one, but dying during the life of her father, was, notwithstanding, entitled to a vested interest in a share of the 1,500*l.*, so as to transmit it to her husband, the defendant, her personal representative: Lord Hardwicke determined, that Letitia took no vested interest, but that the shares in remainder were contingent during the life of Capel Billingsley; since there was no gift of the capital previously to his death, the objects to take it being uncertain till that event happened, and consequently, the time of payment being annexed to the substance of the gift of the legacy (which was at the death of Capel), as Letitia was not then living, she took no interest in it which she could transmit to her personal representative (*m*).

It must be confessed that the cases which have been above cited, and the various distinctions created thereby, have left the law in a state of some confusion as well with respect to the doctrine of controlling a gift *at* a future time, or a direction to pay and divide at a future time or on a given event (or other expressions denoting a postponement of the vesting of a legacy), by reason of its being a bequest in the nature of a remainder; as also with respect to the doctrine previously discussed of controlling such expressions by a gift of the intermediate interest of the fund to the legatee. A general proposition has been laid down on the subject by an eminent writer (*n*), which appears to have met with the approval of Wigram, V.-C., in *Packham v. Gregory* (*o*), viz., that though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the

Where gift is postponed for the convenience of the fund, it is vested:

(*m*) In *Packham v. Gregory*, 4 Hare, 399, it was said by Wigram, V.-C., that, after very great pains, Lord Hardwicke put this case upon the particular circumstances. See also the observations of Parker, V.-C., in *Tribe v. Newland*, 5 De G. & Sm. 238, on *Billingsley v. Wills*; and also the comments of Kindersley, V.-C., in *Westwood v. Southey*, 2 Sim. N. S. 198, 200, who denied that *Billingsley v. Wills* (*supra*) and *Batsford v. Kebbell* (*ante*, p. 987, note (*x*)) established any rule, that if in the first instance there is a gift of the dividends only, and then a gift of the principal with a limitation over, for that reason alone there is no vesting.

(*n*) Jarman on Wills, 6th edit. 1404.

(*o*) 4 Hare, 398. Thus, under a bequest to trustees in trust for A. during his life and after his death to pay and divide among his children, the shares of the children dying in the lifetime of A. are vested and pass to their representatives: *Hallifax v. Wilson*, 16 Ves. 171; Hawkins on Wills, 232.

convenience of the fund or property (as where the future gift is only postponed to let in some other interest), the vesting will not be deferred till the period in question (*p*).

secus, where the attaining of a certain age is made part of the description of the legatee :

This general proposition, however, must not be understood as applicable to cases where the attainment of a particular age is introduced into, and made a constituent part of, the description or character of the objects of the gift; as where the bequest is to *the children who shall attain*, or to *such children as shall attain* the age of twenty-one years; there being in such cases no gift except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*q*). Moreover, it is to be remembered that wherever there is no other gift than in the direction to pay and distribute, then the attain-

(*p*) See accord. *Adams v. Roberts*, 25 Beav. 658; *Re Minor's Trusts*, 28 Beav. 50; *Re Bright's Trusts*, 21 Beav. 67. See also *Re Bennett's Trusts*, 3 K. & J. 280, where it was laid down by Wood, V.-C., that the use of such words as "pay and transfer," as the only words of gift in a deferred bequest, do not make such a bequest contingent. The true criterion is, what was the reason for the postponement. If it was the position of the fund, as in a gift to one for life and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent. The law was laid down by the same judge to the same effect, *Re Theed's Settlement*, 3 Kay & J. 379.

(*q*) *Jarman on Wills*, 6th edit. 1424; *supra*, note (*p*), by Wood, V.-C. See also *Packham v. Gregory*, 4 Hare, 397, 398, 399, where Wigram, V.-C., expressed an opinion that the decision of *Batsford v. Kebbell* (3 Ves. 263), and *Vawdry v. Geddes* (1 Russ. & M. 203), are referable to this principle. See further as to bequests of this kind (and also as to bequests to children when, or as soon as, they attain a certain age), *Newman v. Newman*, 10 Sim. 51; *Bull v. Pritchard*, 1 Russ. 213, 5 Hare, 567, *post*, p. 995, note (*c*); *Festing v. Allen*, 12 M. & W. 479; 5 Hare, 575; *Lord Bute v. Harman*, 9 Beav. 320 (corrected in 16 Beav. 166); *Harrison v. Grimwood*, 12 Beav. 192; *Toller v. Attwood*, 15 Q. B. 929, 953; *Boreham v. Bignall*, 8 Hare, 131; *Southern v. Wollaston*, 16 Beav. 166; *Boulton v. Beard*, 3 De G. M. & G. 608, 613; *Stead v. Platt*, 18 Beav. 50; *Atcherley v. Du Moulin*, 2 Kay & J. 186, 191; *Barnett v. Blake*, 2 Dr. & Sm. 117; *Tracey v. Butcher*, 24 Beav. 438; *Gardiner v. Slater*, 25 Beav. 509; *Pearman v. Pearman*, 33 Beav. 394; *Re Walker*, [1917] 1 Ch. 38. The test would seem to be whether or not in the particular Will the words "attain the age of twenty-one" and such like, are a part of the description of the devisee: *Muskett v. Eaton*, 1 C. D. 435. Where there is a gift of a fund to the testator's children in a class, so soon as the youngest shall attain twenty-one, no child who does not attain that age is entitled to share, the testator having postponed the division till the youngest child attained that age (though a child who attained that age, but died before the time of division, is entitled to a share): *Leeming v. Sherratt*, 2 Hare, 23; *Lloyd v. Lloyd*, 3 Kay & J. 20; see as to these two cases, *Re Ludwig*, [1916] 2 Ch. 26. And it makes no difference that the income is directed to be applied for the maintenance of all the children during their minority: *ibid.* 25. But the

ment of the age at which that payment or division is to take place is, *primâ facie*, a condition precedent to the vesting (*r*).

Difficult questions connected with this subject have arisen on the construction of Wills, by which legacies are limited over on a contingency, by way of executory bequest.

In what way the vesting of a legacy is affected by a limitation over on a contingency.

The general rule appears to be, that a limitation over on a contingency does not, of itself, and without more, prevent any of the shares of the legatees from vesting in the meantime, provided the words of bequest be, in other respects, sufficient to pass a present interest (*s*); though such a limitation over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass (*t*).

Accordingly, in *Skey v. Barnes* (*u*), a testator gave his personal estate to trustees, upon trust to pay the interest to his daughter E. S. for life, and after her decease to pay and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment, to go and be equally divided among them; and if but one, then to such only child; the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one or marriage: If no issue, or all died before their respective portions became payable, then over: One of the children of E. S., having survived her, died under twenty-one and unmarried: It was contended, that the evident intention was that the shares should not vest till twenty-one, but that, in the event of the death of any under that age, the others should take by survivorship: But Sir W. Grant held, that the shares were so given as to vest immediately in the children, though liable to be divested by all dying under twenty-one, without issue: and that, therefore, the share of a child dying under twenty-one passed to its representative. So in *Templeman v. Warrington* (*x*), a testatrix bequeathed the residue of her funded property in trust for her niece for life, and after her death, to be equally divided amongst

rule is different where the bequest is not to a class, but to individuals: *Cooper v. Cooper*, 29 Beav. 229.

(*r*) *Locke v. Lamb*, L. R. 4 Eq. 372; *Merry v. Hill*, L. R. 8 Eq. 619, 624, *per* Malins, V.-O.

(*s*) *Skey v. Barnes*, 3 Meriv. 340; *Davies v. Fisher*, 5 Beav. 214.

(*t*) *Ibid.* Indeed the limitation over has been sometimes considered as affording an argument *in favour* of an immediate vesting. See *post*, p. 994, *note* (*a*).

(*u*) 3 Meriv. 335, 340.

(*x*) 13 Sim. 267, followed in *Re Firth*, [1914] 2 Ch. 386.

all her children, whether sons or daughters, share and share alike; and in case it should happen there was but one child at the niece's death, then to go to that only child; and in failure of issue, to go as the niece should appoint by her Will: The niece had eleven children, three of whom, having survived the testatrix, died in the lifetime of the niece: And it was held by Shadwell, V.-C., that all the children took vested interests; and as more than one survived their mother, there was no divesting of interest; and his Honour said that *Skey v. Barnes* was clearly in point (*y*).

In *Bland v. Williams* (*z*), there was a bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as might be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four, without leaving issue: And it was held by Sir J. Leach, M. R., that the bequest was not void as too remote; but gave a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue: And his Honour observed that "whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the Will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*a*). In this case, the gift over

(*y*) See accord. *Davies v. Fisher*, 5 Beav. 201, 214; *Locker v. Bradley*, *ibid.* 593; *Kimberley v. Tew*, 4 Dr. & Warr. 139. See also *Davidson v. Dallas*, 14 Ves. 577; *Williams v. Clark*, 4 De G. & Sm. 472; *Re Bright's Trusts*, 21 Beav. 67; *Hardcastle v. Hardcastle*, 1 Hemm. & M. 405; *Jopp v. Wood*, 28 Beav. 53; affirmed, 2 De G. J. & Sm. 323.

(*z*) 3 M. & K. 411.

(*a*) "Why not?" is asked in Jarman on Wills, 6th ed., p. 1428, note, commenting on this passage. And that learned author expresses an opinion that a bequest in the terms supposed may admit of the application of the principle of the cases of *Edwards v. Hammond*, 3 Lev. 132; *Doe v. Moore*, 14 East, 601; *Doe v. Nowell*, 1 M. & S. 327; *Bromfield v. Crowder*, 1 New Rep. 313; and *Doe v. Ward*, 9 A. & E. 582, which are cited in another part of the same work (p. 1378), as establishing the proposition, with respect to devises of *real* estate, that though a devise to a person, if he should live to attain a particular age, standing alone, would be contingent, yet if it be followed by a limitation over, in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and

is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise over in case of death under twenty-four without leaving issue. All the cases upon the subject (b), except *Bull v. Pritchard* (c), before Lord Gifford, are reconcileable with this distinction" (d).

indefeasible; the interest in question, therefore, must be construed to vest *instantly*. This class of cases was fully discussed in the House of Lords in *Phipps v. Ackers*, 9 Cl. & F. 583 (on appeal from the decision of Shadwell, V.-O., in *Phipps v. Williams*, 5 Sim. 44), where the judges delivered their opinion (which was adopted by the House), that if a testator devises real estate to O. D., when and so soon as he shall attain his age of twenty-one years, but in case O. D. shall die under the age of twenty-one, without leaving issue, then that the said estate shall sink into and form part of the testator's residuary real estate, and he gives all the residue of real estates to J. C. (subject to various limitations affecting the same); the devisee O. D., on the death of the testator, takes an estate in fee simple, subject to be divested in the event of his dying under twenty-one and without issue: And Tindal, C. J., in delivering the opinion of the judges, said that the class of cases in question went on the principle that the subsequent gift over, in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a futuro contingency: And that whether the doctrine on which this class of cases has rested was originally altogether satisfactory or not, it was sufficient to say that it clearly had been established and recognized, not only in the Court below, but in the House of Lords itself; and that it governed the present case. In the subsequent case of *Festing v. Allen*, 12 M. & W. 301, the Barons of the Exchequer said that they should not feel inclined to extend the doctrine of *Doe v. Moore*, and *Phipps v. Ackers* to cases not precisely similar. It was said by Parker, V.-C. (3 De G. & Sm. 200), that the passage in Sir John Leach's judgment, on which the above comments are made in Jarman on Wills, obviously refers to the Will then before him, and was not meant for general application. See further as to doctrines discussed in this note: *Browne v. Browne*, 3 Sm. & Giff. 568; *Jull v. Jacobs*, 3 O. D. 703; *Re Mid-Kent Railway*, Johns. 387; *Simmonds v. Cocks*, 29 Beav. 455; *Finch v. Lane*, L. R. 10 Eq. 501; *Williams v. Haythorne*, L. R. 6 Ch. 782; *Muskett v. Eaton*, 1 C. D. 435; *Andrew v. Andrew*, 1 O. D. 410.

(b) *Leake v. Robinson*, 2 Meriv. 363; *Farmer v. Francis*, 2 Sim. & Stu. 505; *Vawdry v. Geddes*, 1 Russ. & M. 203; *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455.

(c) 1 Russ. Chanc. Cas. 213. If that case be examined, it will be found to form no exception to the rule as above stated by Sir John Leach; for the gift there was not to all the children, but only to a

(d) See also *Bree v. Perfect*, 1 Coll. 129; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Re Bevan's Trusts*, 34 O. D. 716; *Re Edwards*, [1906] 1 Ch. 570.

Presumption in favour of bequests, by way of portions to children, vesting at twenty-one or marriage.

In construing a settlement or Will, which makes a provision for children subject to a prior life-interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not; and if the instrument is incorrectly or *ambiguously* expressed, or if it contains *conflicting* and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the rational presumption is, that the child acquires a vested and transmissible interest at the period when it is most needed, viz., at twenty-one, if a son, or on marriage or at that age, if a daughter (e).

Accordingly in *Wakefield v. Maffet* (f), where by a marriage settlement, lands were conveyed upon trust for husband and wife successively for life, and, after the death of the survivor, to levy out of the said lands the sum of 3,000*l.* to be divided to and among all the children in equal shares and proportions as

particular class, namely, those who should live to attain twenty-three: *Taylor v. Frobisher*, 5 De G. & Sm. 191, 200, by Parker, V.-C. The testator bequeathed personal property to his trustees and executors upon trust, to pay the dividends to his daughter during her life to her separate use, and after her decease, to pay the principal unto all and every her children *who should live to attain twenty-three years of age*, share and share alike, with benefit of survivorship in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three, without lawful issue: The daughter had a child who died under age in the daughter's lifetime: And Lord Gifford held, that the attainment of the age of twenty-three was necessary to vest an interest in any of the children: and consequently that the bequests to them, and the subsequent limitations, were too remote. See *Bull v. Pritchard*, 5 Hare, 567; *Doe v. Ward*, 9 A. & E. 582, 605; *ante*, p. 992, note (g).

(e) *Emperor v. Rolfe*, 1 Ves. Sen. 208, the authority of which has been recognized by the House of Lords in *Wakefield v. Maffet*, 10 App. Cas. 422; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; *Howgrave v. Cartier*, 3 V. & B. 79, 85, 86; *Perfect v. Lord Curzon*, 5 Madd. 442; *Torres v. Franco*, 1 Russ. & M. 649; *Mocatta v. Lindo*, 9 Sim. 56; *Clutterbuck v. Edwards*, 2 Russ. & M. 577; *Mendham v. Williams*, L. R. 2 Eq. 396; *Jackson v. Dover*, 2 H. & M. 209; *Jeyes v. Savage*, L. R. 10 Ch. 555, explaining *Woodcock v. Duke of Dorset*, *ubi supra*. See also *Day v. Radcliffe*, 3 C. D. 654; *Duffield v. M'Master*, [1906] 1 Ir. R. 333. The rule in *Emperor v. Rolfe* was originally established in relation to settlements, and was extended by *Jackson v. Dover*, *ubi supra*, to Wills: *Re Knowles*, 21 C. D. 806. The rule generally will not be applied where the issue of a deceased child is provided for: *Re Wilmott's Trusts*, L. R. 7 Eq. 532. The rule is the same as to grandchildren where the settlor or testator is *in loco parentis*: but not otherwise: *Swallow v. Binns*, 1 Kay & J. 417; *Farrer v. Barker*, 9 Hare, 737.

(f) 10 App. Cas. 422.

tenants in common and not as joint tenants, the share of a son or sons to be paid to him or them upon his or their respectively arriving at their full age of twenty-one years, and the share of a daughter or daughters on her or their attaining that age or marriage, with provisions for interest by way of maintenance and for benefit of survivorship, if any of the children died, before his, her or their share or shares should become payable, unmarried, and without leaving issue: and a son attained twenty-one and died in the lifetime of his father, it was held that, there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule applied and the son took a vested interest on attaining twenty-one.

But when the testator has unequivocally expressed an intention, that a provision to be made for his children shall depend on their surviving both or either of their parents, the Court must give effect to that intention, and can only lean to the presumption in favour of children, where the intention of the testator is ambiguously expressed (*g*).

An illustration of these doctrines may be found in the decision of *Whatford v. Moore* (*h*); in the arguments of which case almost all the previous authorities on this subject were cited: And Lord Cottenham, in giving his judgment, made the following observations: "In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying (*i.e.*, attaining their age in the lifetime of their parents and dying before them), as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object (*i*), but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them." His Lordship further observed, that, "the cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule

(*g*) *Howgrave v. Cartier*, 3 V. & B. 85; *Hotchkin v. Humfrey*, 2 Madd. 65; *Fitzgerald v. Field*, 1 Russ. 430; *Tucker v. Harris*, 5 Sim. 538; *Tawney v. Ward*, 1 Beav. 563; *Ex parte Hunter*, 3 Younge & C. 610; *Bright v. Rowe*, 3 M. & K. 316; *Evans v. Scott*, 1 H. L. O. 43; *Skipper v. King*, 12 Beav. 29; *Re Williams*, 12 Beav. 317; *Farrer v. Barker*, 9 Hare, 737; *Jeffery v. Jeffery*, 17 Sim. 26; *Day v. Radcliffe*, 3 O. D. 654.

(*h*) 7 Sim. 574; 3 My. & Cr. 270; *Jeyes v. Savage*, L. R. 10 Ch. 555.

(*i*) *Farrer v. Barker*, 9 Hare, 744, by Turner, V.-C.; accord.

which has been generally recognized, of leaning in favour of a construction which includes all the children, if the instrument affords fair ground for doing so; but if not, to give effect to the plain meaning of the words used." And his Lordship added that the cases "have proceeded upon grounds so peculiar, and have departed so widely from the rule of construing instruments according to the obvious and natural meaning of the words used, that it is not possible to come to any very satisfactory conclusion upon any case which varies at all from former decisions."

A bequest to a class which is void for remoteness as to any member of that class, fails altogether.

It must be observed, however, that a gift to a class which is void as to any member of that class, by reason of being too remote, must fail altogether: Therefore if a bequest is made to a class of persons, in such a manner, that, with respect to some of the members of it, it is too remote, by reason of the interest not vesting within the legal limits during which a bequest may take effect, the whole gift fails, notwithstanding, with respect to other of the class, it may not be too remote; for what the Court has to determine is, *whether the class can take*; if not, the Court cannot split into portions the general bequest to the class, and say, that because the rule of law forbids the testator's intention from operating in favour of the whole case, his bequests shall be made, what he never intended them to be, viz., a series of particular legacies to particular individuals, or distinct bequests, in each instance, to two different classes: for this, in effect, would be to make a new Will for the testator (*k*). Nor will this rule be varied, even in favour of a person who is *named* by the testator, and with respect to whom, individually, the bequest is not too remote, if he is mentioned as a member of the class, with respect to whom, as a class, the gift is too remote (*l*).

(*k*) *Leake v. Robinson*, 2 Mer. 363, 390; *Dungannon v. Smith*, 12 Cl. & F. 546; *Seaman v. Wood*, 22 Beav. 591; *Smith v. Smith*, L. R. 5 Ch. 342; *Hale v. Hale*, 3 C. D. 643; *Pearks v. Moseley*, 5 App. Cas. 714. But where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law: *Storrs v. Benbow*, 3 De G. M. & G. 390; *Cattlin v. Brown*, 11 Hare, 377; *Wilkinson v. Duncan*, 30 Beav. 111. See also *Webster v. Boddington*, 26 Beav. 128, 137; *Bentinck v. Portland*, 7 C. D. 693. And cf. *Picken v. Matthews*, 10 C. D. 264.

(*l*) *Porter v. Fox*, 6 Sim. 485; *Re Mervin*, [1891] 3 Ch. 197. See, however, *James v. Lord Wynford*, 1 Sm. & G. 40, in which case

Where, however, a testator gave his residuary estate in trust, after life interests, for all the daughters of M. who should attain twenty-one or marry, with a proviso directing a settlement of such daughter's shares, and M. had one daughter only who attained twenty-one, and she was born in the lifetime of the testator, it was held by the Court of Appeal, affirming Chitty, J., that the proviso for settlement of the shares must be construed as applicable to each share separately; and that although it would have been void for remoteness in the case of daughters born after the testator, it was valid in the case of M.'s only daughter, and therefore that she was only entitled to a life interest in the fund (*m*).

Another question, closely connected with these points, has frequently arisen, viz., whether the terms of a legacy give to the legatee an absolute and indefeasible interest in the thing bequeathed, or an interest, which, though vested in him, is subject to an executory bequest over, on the happening of a particular event. But this inquiry will, perhaps, be more appropriately introduced hereafter (*n*), in conjunction with the doctrine of conditional legacies.

Vested legacies subject to executory bequest over.

3. The Lapse of Legacies payable out of the Real Estate.

As to legacies payable out of real estate only, the first rule above stated (*o*), as adopted with respect to legacies payable out of personal estate, viz., that when the gift and the time of payment are distinct, the legacy vests immediately, does not hold, generally speaking.

The reason of this distinction is, that, in the civil law, a bequest to a person to be paid at a future time, was held to confer on him a present right to the legacy, notwithstanding the time of payment was future; so that, immediately on the testator's decease, it became, in the eye of the civil law, a

Distinction between legacies payable out of real estate and legacies payable out of personal estate as to time of vesting.

Stuart, V.-C., says that he has some difficulty in following the decision in *Porter v. Fox*, which seems to him "not sustainable on an accurate view of what was said by Sir W. Grant in *Leake v. Robinson*." But *Porter v. Fox* would seem to be in accordance with the later decisions if the amount of the share of the individual named could not be ascertained without ascertaining the whole number of shares, including the shares of those to whom the bequest would be too remote.

(*m*) *Re Russell*, [1895] 2 Ch. 698; *Re Game*, [1907] 1 Ch. 276.

(*n*) *Post*, p. 1003 *et seq.*

(*o*) *Ante*, p. 974.

present debt, payable at a future time. Now, anciently, legatory matters arising on personal estate were solely under the jurisdiction of the Ecclesiastical Courts, and the decisions of those Courts were regulated by the civil law: By degrees Courts of Equity took cognizance of them, and with a view to uniformity of decision, adopted the rule in question, in respect to such legacies: But legacies payable out of real estate never fell within the cognizance of the Ecclesiastical Courts; there was not, therefore, the same reason for applying this rule to that description of legacies; and, as it appeared contrary to the favour which the law shows to the owner of the inheritance, Courts of Equity rejected it as a general rule in respect to all such legacies (*p*).

The leading case generally referred to as establishing this distinction, is *Poulet v. Poulet*, or *Pawlett v. Pawlett* (*q*): There Lord Pawlett settled by deed real property in trustees for a term of years in remainder after his death, upon trust, after payment of his debts, to pay such sums of money and maintenance for younger children as his Lordship should appoint by Will; and in default of appointment to raise 4,000*l.* a-piece for each such child, payable at twenty-one or marriage, with maintenance in the intermediate time: Lord Pawlett appointed by Will to his two daughters, and only younger children, Susanna and Vere, 4,000*l.* each, to be raised and paid in money, and at the times, and with the maintenance prescribed by the deed: Both daughters survived him: But Vere died under age, and unmarried, before any part of her portion could be raised; and her mother was her administratrix, who claimed her portion: The question was, whether such claim could be supported, as Vere died under twenty-one, and unmarried: And the Lord Keeper determined in the negative; observing that "the portion was to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the Will."

The rule of law laid down in the case of *Pawlett v. Pawlett* has been adopted in a numerous series of cases (*r*), and in con-

(*p*) *Fearne*, Cont. Rem. 555, note by Mr. Butler.

(*q*) 2 Ventr. 366; 1 Vern. 204, 321.

(*r*) *Smith v. Smith*, 2 Vern. 92; *Yates v. Phettiplace*, 2 Vern. 416; *S. C.*, Prec. Chanc. 140; *Reynish v. Martin*, 3 Atk. 335; *Jennings v. Looks*, 2 P. Wms. 276; *Duke of Chandos v. Talbot*, 2 P. Wms. 610; *Prowse v. Abingdon*, 1 Atk. 485; *Harrison v. Naylor*, 3 Bro. C. C. 108; *Parker v. Hodgson*, 1 Dr. & Sm. 568, and the authorities cited

formity with the principle of it, it has been further decided, that a gift of interest until the legacy becomes due will not vest the principal, when the legacy is charged on land; but if the legatee dies before time of payment, the legacy is lost (*s*).

But a difference observable in the apparent motives for the postponement of legacies, has given rise to an extensive exception from this general rule respecting the vesting of legacies charged on land. Thus when a legacy is bequeathed to a child on its attaining twenty-one, or marrying, or on any other event personal to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy; whereas when the estate is devised to a person for life, and after his decease is charged with a legacy, the legacy is evidently postponed till the decease of the devisee for life, from its being incompatible with his life estate, that it should be raised in his lifetime. The payment of the legacy is therefore considered to be postponed, in the first case from regard to circumstances personal to the legatee; and in the second from regard to the circumstances of the estate; and it has been inferred, that in cases of the first description, the testator does not intend the legatee shall receive the legacy, unless the circumstance happens on which the testator made it payable; and that in cases of the second description, the testator intends the legatee shall receive it at all events. In the former cases, therefore, it has been held, that if the legatee dies while the time of payment is in suspense, the legacy sinks into the land for the benefit of the inheritance; and in the latter cases it has been held, that if the legatee dies during the continuance of the preceding estate or interest, his personal representatives will be entitled, on its determination, to have the legacy raised for their benefit (*t*).

The case of *King v. Withers* (*u*), which there has already

in the arguments and judgment in that case. The rule is not to be applied to legacies given out of monies to arise from the sale of land: *Re Hart's Trusts*, 3 De G. & J. 195, nor to legacies given out of a mixed fund consisting of the proceeds of the sale of real estate directed to be sold, and pure personal estate: *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bellairs v. Bellairs*, L. R. 18 Eq. 510, 517. The proceeds of realty and personalty directed to be applied to the same object are, it would seem, a mixed fund, to which the rules applicable to personalty apply: *Genery v. Fitzgerald*, Jac. 468.

(*s*) *Gawler v. Standewick*, 1 Bro. C. C. 106, in a note to *Green v. Pigot*.

(*t*) *Fearne*, Cont. Rem. 557, note by Mr. Butler.

(*u*) *Cas temp. Talb.* 116, *ante*, p. 666.

been occasion to state, is the leading case by which this exception has been established, as to the vesting of legacies payable out of the real estate at a future time: and the principle of that decision has been adopted in a multitude of subsequent cases (*x*).

So the rule in question is always liable to the operation of the more general and powerful rule, namely, that the intention of the testator, to be gathered from the words of the Will, must prevail (*y*).

It must be further observed, with respect to this general rule, that it may clearly be controlled by a direction in the Will that the legacy should vest on the testator's death: Thus in the case of *Brown v. Wooler* (*z*), the testator gave legacies charged on his real estate to his two daughters, "*the same to vest in them immediately on my death*, but to be paid on their attaining the ages of twenty-one years, and the interest thereof in the meantime to be applied to their maintenance and education:" The daughters both died infants; and it was contended, that the legacies, as against the real estate, must sink for the benefit of the devisee, but Sir John Leach, V.-C., held, that this was prevented by the express direction that the legacies should vest on the death of the testator: and, therefore, that the personal representatives of the daughters were entitled to the legacies.

4. *The Lapse of Legacies charged on a mixed fund of Realty and Personality.*

It sometimes happens that legacies are charged on a mixed fund, that is, both on real and personal estate: In that case, the personal estate is considered to be the primary fund, and the real estate to be the auxiliary fund for the payment of the legacies (*a*). So far as the personal fund will extend to pay

(*x*) *Godwin v. Munday*, 1 Bro. Chanc. Cas. 191, and the cases in the notes thereto: *Lowther v. Condon*, 2 Atk. 128; *Emes v. Hancock*, 2 Atk. 507; *Sherman v. Collins*, 3 Atk. 319; *Hodgson v. Rawson*, 1 Ves. Sen. 44; *Embrey v. Martin*, Ambl. 230; *Manning v. Herbert*, Ambl. 575; *Jeale v. Titchener*, Ambl. 703; *Dawson v. Killett*, 1 Bro. O. C. 119, and the cases in the notes; *Walker v. Main*, 1 Jac. & Walk. 17; *Watkins v. Cheek*, 2 Sim. & Stu. 199; *Poole v. Terry*, 4 Sim. 294; *Murkin v. Phillipson*, 3 M. & K. 257; *Goulburn v. Brooks*, 2 Younge & O. 539; *Salisbury v. Petty*, 3 Hare, 86, 90, 91; *Evans v. Scott*, 1 H. L. O. 43, 57; *Remnant v. Hood*, 27 Beav. 74; 2 De G. F. & J. 396.

(*y*) 2 Y. & Coll. O. C. 134, 138.

(*z*) *Watkins v. Cheek*, 2 Sim. & Stu. 199.

(*a*) See *post*, Pt. IV. Bk. I. Ch. II. § 1.

them, the case is governed by the same rules as if the legacies were payable out of personal estate only; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on the real estate only (b).

In concluding the general inquiry into the doctrines by which it is ascertainable whether the legacies are vested or contingent, it may be proper to consider the question which arises on Wills in which the testator expressly declares that the legacies given by it shall or shall not be *vested* at or until a particular period. In such cases the word "vested" has been frequently construed in a sense different from its strictly legal meaning. Thus it has been sometimes regarded as meaning "transmissible" (c), sometimes as meaning "vesting in possession" (d), or "payable" (e): sometimes as meaning "indefeasible" (f). But the distinct and definite meaning which the word legally bears must be attributed to it in construing the Will in which it is contained, unless there is evidence from the context that the testator did not mean to affix that meaning to the expression (g).

Effect of the testator's declaring that a legacy shall or shall not be vested at a particular period.

SECTION VI.

Legacies on Conditions.

In the preceding section one sort of conditional legacy has been considered: viz., where the condition is that the legatee

(b) *Fearne*, Cont. Rem. 557, note by Butler; *Chandos v. Talbot*, 2 P. Wms. 601; *Prowse v. Abingdon*, 1 Atk. 482; *Re Hudson's Trusts*, 1 Dru. 6, t. Sugden, C. of Ireland. Cf. *ante*, p. 1000, note (r).

(c) *Taylor v. Frobisher*, 5 De G. & Sm. 191, 198.

(d) *King v. Cullen*, 2 De G. & Sm. 252; *Simpson v. Peach*, L. R. 16 Eq. 208. So the word "entitled" may mean "entitled in possession," i.e., entitled to payment: *Jopp v. Wood*, 28 Beav. 53; affirmed, 2 De G. J. & Sm. 323; *Umbers v. Jaggard*, L. R. 9 Eq. 200; *Re Noyce*, 31 C. D. 75; *Re Maunder*, [1902] 2 Ch. 875; [1903] 1 Ch. 451. See *Greenhalgh v. Bates*, L. R. 2 P. & D. 47.

(e) *Sillick v. Booth*, 1 Y. & Coll. Ch. C. 121.

(f) *Berkeley v. Swinburne*, 16 Sim. 275; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Poole v. Bott*, 11 Hare, 33; *Re Thatcher's Trust*, 26 Beav. 365, 368; *Re Edmondson's Estate*, L. R. 5 Eq. 389; *Armstrong v. Wilkinson*, 3 App. Cas. 355. *Ante*, p. 849, note (t).

(g) *Glanvill v. Glanvill*, 2 Mer. 38; *Re Thruston's Will*, 17 Sim. 21; *Re Blakemore's Settlement*, 20 Beav. 214; *Re Morse's Trust*, 21 Beav. 174; *Rowland v. Tawney*, 26 Beav. 67; *Re Thatcher's Trust*, 26 Beav. 365; *Re Arnold's Estate*, 33 Beav. 163; *Richardson v. Power*, 19 C. B. N. S. 780.

shall be alive at a particular period: It is now proposed to treat of this species of legacy generally.

Conditional
legacy:
definition.

A conditional legacy is defined to be a bequest whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or to be defeated.

No precise form of words is necessary in order to create conditions in Wills: but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect (*h*).

In the case of *Tattersall v. Howell* (*i*), a legacy was given provided the legatee changed his course of life and gave up all low company and frequenting public houses: And Sir W. Grant held, that this was a condition such as the Court would carry into effect, and directed the Master to inquire whether the legatee had discontinued to frequent public houses, keeping low company, &c.

Of conditions
precedent or
subsequent:

Conditions are subject to the well-known division into conditions precedent, and conditions subsequent (*k*). When a condition is of the former sort, the legatee has no vested interest till the condition is performed: when it is of the latter, the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition (*l*). It has been held that a contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and determine (*m*).

(*h*) Godolph. Pt. 3, c. 4, s. 4; *Egg v. Devey*, 10 Beav. 444.

(*i*) 2 Meriv. 26. But see *Maud v. Maud*, 27 Beav. 615.

(*k*) See, as to the distinction between them, *Davis v. Angel*, 31 Beav. 223. And see, as to the distinction between a condition subsequent and a conditional limitation, *Gulliver v. Ashby*, 4 Burr. 1929; *post*, p. 1014 *et seq.*

(*l*) See the authorities cited by Manning, Serjt., *arguendo*, in *Wynne v. Wynne*, 2 M. & Gr. 14 *et seq.* And see Roper on Legacies, p. 838 *et seq.* Every condition by the civil law suspends the legacy: so that a condition subsequent by the civil law is of the nature of a condition precedent at common law: *Harvey v. Aston*, Com. Rep. 738.

(*m*) *Egerton v. Lord Brownlow*, 4 H. L. C. 1, where the condition was that the tenant for life should acquire a title; and see *Re Wallace*, [1920] 2 Ch. 274. Where, however, a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, the condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine: by Lord Cranworth in *Clavering v. Ellison*, 7 H. L. C. 707, 725. Such limitations must be certain, not only in expression, but also in operation, and it is essential

For example, in the instances already adduced of contingent legacies, the endurance of the life of the legatee till the period specified, was a condition precedent to the legacy vesting in him; and since, by reason of his death, he failed to perform the condition, he never acquired any vested interest.

For an example of a condition subsequent may be mentioned the case of *Nicholls v. Osborn (n)*, where the testator bequeathed the surplus of his personal estate to his niece, about the age of seventeen, to be paid to her at the age of twenty-one; and if she should die before twenty-one or marriage, then over: And it was held, that the surplus vested in the niece, and that the bequest over was on a condition subsequent.

So in *Gray v. Garman (o)*, there was a gift by a testator of his real and personal estate to his wife for her life, and the residue to be divided equally among her brothers and sisters: *and in case any of them should be dead, at the time of her decease, leaving issue*, such issue to stand in their parent's place: And it was held, that each of the brothers and sisters, who survived the testator, took vested interests in their shares, subject to be divested in the event of his or her death, *leaving issue*, in the lifetime of the widow: Consequently, that the brothers and sisters who died *without issue* in her lifetime were entitled to share in the residue; inasmuch as the event had not happened on which their vested interest was liable to be divested (*p*).

It may be observed that the tendency in modern times has been to depart from the strict interpretation adopted in earlier periods of our law, when these matters were considered only with reference to common law, and that where the language of the Will and the intention of the testator admit of it, these bequests "on condition" are to be considered as imposing a trust, and not as conditions which shall take the property out of the legatee, if he does not comply with them (*q*).

conditions subsequent considered as trusts imposed rather than as conditions.

to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect: *Re Exmouth*, 23 O. D. 158; *Re Sandbrook*, [1912] 2 Ch. 471.

(*n*) 2 P. Wms. 419.

(*o*) 2 Hare, 268.

(*p*) See also *Salisbury v. Petty*, 3 Hare, 86. And for further instances of vested legacies subject to be divested on a subsequent event, see *Heron v. Stokes*, 2 Dr. & W. 69—115; *Kimberley v. Tew*, 4 Dr. & W. 139; *Simmonds v. Cocks*, 29 Beav. 455.

(*q*) *Wright v. Wilkin*, 2 Best & Sm. 232, 252.

Bequest to one and "in case of his death" to another.

It is fully established as a general rule, that a bequest to any person, "and in case of his death" to another, is an absolute gift to the first legatee, if he survives the testator; and this, whatever be the form of expression, as "if he die," "should he happen to die," "in case death should happen to him," and so forth: The event here contemplated being so inevitable, that it cannot be deemed a contingency, the Courts have held, that something else must be intended than merely to provide for the case of the legatee dying at some time or other; and have said, that they will rather suppose the testator to have contemplated and provided for the case of the legatee dying in his own lifetime; and so have read those words as if they had been "in case of his death during the testator's lifetime:" in which event alone they have allowed the bequest over to take effect(r). But in the case of an immediate bequest to any person, "and in case of his death *without children*" to another, it has been held, that if at any time, whether before or after the death of the testator, the legatee dies without leaving a child, the gift over takes effect; for the event spoken of is not a certain but a contingent event(s); and the introduction of a previous life estate will not alter that principle of construction unless a contrary intention appears in the Will (t).

(r) *Hinckley v. Simmons*, 4 Ves. 160; *Cambridge v. Rous*, 8 Ves. 12; *Ommaney v. Bevan*, 18 Ves. 291; *Schenk v. Agnew*, 4 K. & J. 405; *Re More's Trust*, 10 Haro, 171; *Re Hayward*, 19 C. D. 470; *Elliott v. Smith*, 22 C. D. 236; *Re Fisher*, [1915] 1 Ch. 302. In *Re Hayward*, *ubi supra*, Fry, J., thus states the law: "There is no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is *primâ facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word 'death' to death during the lifetime of the testator or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death which is certain, as a contingency, but when the testator has spoken of death *sub modo*, that being contingent, there is no need to render it contingent by introducing any limitation."

(s) *Galland v. Leonard*, 1 Swanst. 161; *Edwards v. Edwards*, 15 Beav. 357; *Bowers v. Bowers*, L. R. 5 Ch. 244.

(t) *Olivant v. Wright*, 1 C. D. 346; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408, overruling *Re Heathcote's Trusts*, L. R. 9 Ch. 45; *Besant v. Cox*, 6 C. D. 604. See also *Re Schnadhorst*, [1901] 2 Ch. 338; [1902] 2 Ch. 234. When a Will refers to the death of a legatee coupled with a contingency—as death without leaving issue—that *primâ facie* means death whenever

On the other hand, if there is a bequest to one for life and after his decease to A., and "in case of A.'s death to B.," the contingency is held referable to the lifetime of the first legatee; and the bequest over only takes effect in case A. dies during the continuance of the life estate; he takes absolutely, if he survives the tenant for life (*u*).

Likewise, a bequest to A., when and if he attains the age of twenty-one, and "in case of his death" to B., is a gift absolute to A., unless he dies under age (*x*).

It is, however, plain that these general rules cease to be applicable, where it appears, from the whole of the Will, that their application would frustrate the intention of the testator (*y*). Thus, in *Child v. Giblett* (*z*), a testator bequeathed the residue of his estate to his daughters Selina and Elizabeth, in equal proportions; and "in case of the death of either," the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of Paul Giblett: The daughters both survived the testator; Elizabeth died without having been married, and bequeathed the whole of her property to Selina: The question was whether Selina was entitled to an absolute interest in the residuary property of her father: And Sir John Leach, M. R., held, that she was not so entitled, but that the bequest to her continued subject to the executory bequest over, in favour of Paul Giblett's children:

it may happen, as was decided in *O'Mahoney v. Burdett* and *Ingram v. Soutten*; but the context may show that death before a particular period was really intended: *per* Kay, J., in *Re Luddy*, 25 C. D. 394.

(*u*) *Hervey v. McLaughlin*, 1 Price, 264; *Salisbury v. Petty*, 3 Hare, 86, 93; *Edwards v. Edwards*, 15 Beav. 363, 364; *Re Hill's Trusts*, L. R. 12 Eq. 302. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator, and when the gift in fee is preceded by a life estate, the contingency has been held to refer to the death of the donee, either during the preceding life-estate or in the lifetime of the testator. But where the gift over is not on a certain event, *e.g.*, where death is coupled with the contingency of not leaving issue, there is no need to import any words, and consequently there is no necessity for limiting the event to the testator's lifetime: *Re Parry and Daggs*, 31 C. D. 130.

(*x*) *Home v. Pillans*, 2 M. & K. 15, 24, the doctrine of which was upheld in *Randfield v. Randfield*, 8 H. L. C. 225. See also *Re Dowling's Trusts*, L. R. 14 Eq. 463.

(*y*) *Re Adam's Trusts*, 11 Jur. N. S. 961; *Milner v. Milner*, 34 Beav. 276; *Smith v. Spencer*, 6 De G. M. & G. 631, 634, by Lord Cranworth; *Wilkins v. Jodrell*, 13 C. D. 564.

(*z*) 3 M. & K. 71.

And his Honour observed, that the testator could not possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters and their death without issue in his lifetime, and that they should not take in the event of a marriage of his daughters and their dying without children after the decease (a).

Conveyancing
Act, 1882,
s. 10 (1), as
to executory
limitations.

With respect to executory limitations contained in instruments coming into operation after the 31st December, 1882, sect. 10 (1) of the Conveyancing Act, 1882, provides as follows: "Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect."

Impossible
conditions
precedent:

With respect to conditions precedent, which are impossible, a different rule is applicable to bequests of personal property, from that which is prevalent respecting devises of realty. By the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void (b). But by the civil law, which on this subject has been adopted by the Courts of Equity (c), when a condition precedent to the vesting of a legacy is impossible, the bequest is single, *i.e.*, discharged of the condition; and the legatee will be entitled as if the legacy were unconditional (d).

If indeed the impossibility of the condition were unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens to be then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the Will, but dies before the marriage can be solemnized; the impracticability of the performance will be a bar to the claim of the legatee (e); in cases,

(a) See also *Billings v. Sandom*, 1 Bro. C. C. 393; *Nowlan v. Nelligan*, 1 Bro. C. C. 480; *Douglas v. Chalmer*, 2 Ves. 501; *Ex parte Hunter*, 3 Younge & C. 610; *Brotherton v. Bury*, 18 Beav. 95.

(b) Co. Lit. 206, b; *Roundel v. Curren*, 2 Bro. C. C. 73.

(c) *Lowther v. Cavendish*, 1 Eden, 116, 117.

(d) Swinb. Pt. 4, s. 6, pl. 2, 3; *Harvey v. Aston*, Com. Rep. 738.

(e) Swinb. Pt. 4, s. 6, pl. 8, 14; *Lowther v. Cavendish*, 1 Eden, 116, 117; *Priestley v. Holgate*, 3 Kay & J. 286, where the condition

at least, such as those mentioned, where the performance of the condition appears to be the motive of the bequest (f).

Where a condition subsequent is impossible, it is the doctrine as well of the common law as of the civil, that the condition is void, and the legacy single and absolute (g), and if the performance of the condition subsequent be rendered impossible by the act of God, the gift to which the condition is attached is good, even though there is a gift over on non-performance of the condition (h).

Impossible
conditions
subsequent :

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill A., burn his house, or the like, then both by the common and civil law, not only the condition but the bequest itself is void (i). But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there (although by the common law the devise as well as the condition is equally void as if there existed *malum in se*), by the civil law, the condition only is void, and the bequest single and good (k). Thus, where the testator bequeathed to his niece 2*l.* a month if she lived with her husband, and 5*l.* a month, *if she lived from him*, Lord Northington was of opinion that she was entitled to the 5*l.* a month payment: for the condition being *contra bonos mores*, the bequest was single (l).

Illegal
conditions
precedent :

was that the legatee should return home, and the ship in which he was sailing home went down. Cf. *Falkland v. Bertie*, 2 Vern. 333; *Clark v. Parker*, 19 Ves. 1; *Boyce v. Boyce*, 16 Sim. 476.

(f) But an immediate gift will not be avoided because the testator does not do a future act contemplated by the words of such gift: *Yates v. University College, London*, L. R. 8 Ch. 454; in which case Lord Selborne says that when some of the authorities speak of some impossible conditions as not being enough to defeat a gift even when they are in form precedent, the real meaning is that a condition may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist: *Ibid.* p. 461; *S. C.*, L. R. 7 H. L. 438.

(g) Co. Lit. 206, a, b; *Lowther v. Cavendish*, Amb. 358; *Thomas v. Howell*, 1 Salk. 170; *Harvey v. Aston*, Com. Rep. 738; *Aislabie v. Rice*, 3 Madd. 256; *Burchett v. Woolward*, Turn. & Russ. 442; *Walker v. Walker*, 2 De G. F. & J. 255; and cf. *Re Croxon*, [1904] 1 Ch. 252; and *Re Grove*, [1919] 1 Ch. 249.

(h) *Collett v. Collett*, 35 Beav. 312; *Re Greenwood*, [1903] 1 Ch. 749.

(i) Swinb. Pt. 4, s. 6, pl. 16, and the note in Powell's edit. *Re Moore*, 39 O. D. 116, 122.

(k) Swinb. Pt. 4, s. 6, pl. 16; *Harvey v. Aston*, Com. Rep. 738; *Re Moore*, *ubi supra*.

(l) *Brown v. Peck*, 1 Eden, 140. See *Re Lovell*, [1920] 1 Ch. 122, where a bequest to a deserted wife until her husband returned to her was held valid. See also *Tenant v. Bray*, cited Toth. 141, in which case there was a devise to a daughter to pay her a sum of money if

Illegal
conditions
subsequent :

Where the performance of a condition subsequent is illegal, then, as well at the common law as by the civil law adopted in the Courts of Equity, the condition is void, and bequest freed from it, as though it had been given unconditionally (*m*).

On the same principle, an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect; as by a gift over which is void by reason of being too remote (*n*). And the rule in general, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect (*o*).

Repugnant
conditions :

Among illegal conditions subsequent, may be classed such as are repugnant. "I find it laid down as a rule long ago established," said Lord Alvanley, in *Bradley v. Peixoto* (*p*), "that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void:" In that case, the testator had given his son the dividends of 1,620*l*. Bank stock for his support during life, and at his death the principal and interest were given to his heirs, executors, administrators, and assigns; but *if he attempted to dispose of all or any part of the stock*, such attempt should exclude him from any benefit under the Will, and be a forfeiture, and the fund should go to the testator's other children: The learned judge

she should be divorced from her husband, and the gift was made good, though the condition was void. See further, as to the legality of the separation of husband and wife, *Jones v. Waite*, 1 Bing. N. C. 656; *S. C.*, in error, 5 Bing. 341. In Dom. Proc. 4 M. & Gr. 1104; 9 Cl. & F. 101; *Cocksedge v. Cocksedge*, 14 Sim. 44; *Wilson v. Wilson*, 1 H. L. C. 538; *Cartwright v. Cartwright*, 10 Hare, 630; 3 De G. M. & G. 982; *Webster v. Webster*, 4 De G. M. & G. 437. In *Dowager Duchess of Marlborough v. Duke of Marlborough*, [1901] 1 Ch. 165, a power which authorized an appointment of a jointure to a second wife during the lifetime of the first wife (who had been divorced) was held valid, and not contrary to public policy. See further as to conditions in restraint of marriage, *post*, p. 1020 *et seq*.

(*m*) Co. Lit. 236, *a, b*; *Poor v. Mial*, 6 Madd. 32; *Ridgway v. Woodhouse*, 7 Beav. 437; *Egerton v. Lord Brownlow*, 4 H. L. C. 1; *Re Beard*, [1908] 1 Ch. 383; *Re Sandbrook*, [1912] 2 Ch. 471. Cf. *Re Wallace*, [1920] 2 Ch. 274. So where the condition is too uncertain to enable the Court to say what is meant by it: *Clavering v. Ellison*, 7 H. L. C. 707; or whether it has or has not happened: *Re Exmouth*, 23 C. D. 158; *Re Sandbrook*, *supra*.

(*n*) *Blease v. Burgh*, 2 Beav. 221, 226; *Ring v. Hardwick*, *ibid.* 352.

(*o*) *Green v. Harvey*, 1 Hare, 428, 431; *Winckworth v. Winckworth*, 8 Beav. 576; *Eaton v. Barker*, 2 Coll. 124; *Watkins v. Weston*, 32 L. J. Ch. 396; affirmed, *ibid.* 609.

(*p*) 3 Ves. 325. This case has been approved in *Re Dugdale*, 38 C. D. 173.

was of opinion, that the legatee was entitled to the legacy discharged of the condition (q).

But though a condition, restraining the legatee from spending or disposing of the legacy *generally*, is repugnant and void; yet it may be good if the restraint is confined to the disposal of it *to a particular person* (r), or (it has been said) before a *particular time* (s). But the case cited does not seem an authority for this latter proposition, because there the condition was attached merely to a gift in remainder so as to prevent its ever taking effect if the condition happened: and accordingly in the case of *Re Rosher* (t), Pearson, J., held that a condition restraining alienation, although limited to a *particular time*, was void. So the condition may be carried into effect, if it is so expressed *as to amount to a limitation* (u). "If property," said Lord Eldon, in *Brandon v. Robinson* (x), "is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and, after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso, that he shall not sell or alien it: If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man or his assignees can have it beyond the period limited" (y).

Difference between a gift for life with a condition restraining the legatee from disposing of it, and a gift for life or until he shall dispose of it, or until he shall become bankrupt.

(q) See also *Ware v. Cann*, 10 B. & C. 433; *Billing v. Billing*, 5 Sim. 232; *Rishton v. Cobb*, 5 M. & Cr. 145, *post*, p. 1022, note (r); *Byng v. Lord Strafford*, 5 Beav. 558, 567; *Attwater v. Attwater*, 18 Beav. 330; *Hood v. Oglander*, 34 L. J. Ch. 528; *Hunt-Foulston v. Furber*, 3 C. D. 285; *Shaw v. Ford*, 7 C. D. 669 (where the rules regulating the validity of executory devises will be found discussed); *Re Dugdale*, 38 C. D. 176; *Re Smith*, S. v. S., [1916] 1 Ch. 369. A "name clause" following a gift in fee simple is void, and the legatee incurs no forfeiture: *Musgrave v. Brooke*, 26 C. D. 792. Where there is a devise of an estate in fee, a proviso determining such estate on bankruptcy as a condition is void, and such a clause will not be construed as a conditional limitation unless the gift is merely of an estate for life: *Re Machu*, 21 C. D. 838. And see *Re Dugdale*, 38 C. D. 176, 182.

(r) Litt. Sec. 361; Swinb. Pt. 4, s. 13, pl. 6.

(s) *Large's Case*, 2 Leon. 82.

(t) 26 C. D. 801.

(u) *Wilkinson v. Wilkinson*, 2 Wils. C. C. 47.

(x) 18 Ves. 433.

(y) See *Dommett v. Bedford*, 6 T. R. 684; *Shee v. Hale*, 13 Ves. 405; *Brandon v. Robinson*, 18 Ves. 429; *Cooper v. Wyatt*, 5 Madd. 482. As to the time when a condition subsequent must happen to operate as a forfeiture of the estate to which it is attached, and the effect of annulment in cases where bankruptcy is the condition subsequent on which forfeiture is to ensue, see *White v. Chitty*, L. R. 1 Eq. 372; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Cox v. Fonblanque*, L. R. 6 Eq.

An owner of property cannot by way of settlement or contract qualify his own interest in property by a condition determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors (*z*); but this rule applies only to a limitation upon bankruptcy, and to cases where but for this limitation the property or income would have come to the trustee in bankruptcy, and then only so far as it would have thus come (*a*).

A gift over, annexed to an absolute bequest, if legatee dies without having disposed of it by will or otherwise, is void.

Another instance of a repugnant, and therefore void, condition may be found in the doctrine that if there be an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by Will, or otherwise, his interest in it shall cease, and it shall go over to another; the gift over is void and the legacy absolute (*b*). But if the estate to which the repugnant gift is attached never becomes an estate in pos-

482; *Trappes v. Meredith*, L. R. 7 Ch. 248; *Re Parnham's Trusts*, L. R. 13 Eq. 413; *Ancona v. Waddell*, 10 C. D. 157; *Samuel v. Samuel*, 12 C. D. 152; *Robertson v. Richardson*, 30 C. D. 623; *Metcalfe v. Metcalfe*, [1891] 3 Ch. 1; *Re Loftus-Otway*, [1895] 2 Ch. 235; *West v. Williams*, [1899] 1 Ch. at p. 148. The principle is, that where the words of the proviso for forfeiture are words of futurity, the forfeiture does not take place, if the bankruptcy has been annulled before the first payment becomes due, *per* Jessel, M. R., in *Re Parnham's Trusts*, *ubi supra*; and see *Re Evans*, [1920] 2 Ch. 304. The rule recognized in *Metcalfe v. Metcalfe*, *ubi supra*, that a forfeiture clause in a Will providing that, in the event of alienation by or bankruptcy of a legatee, his interest under the Will "shall thenceforth cease and determine," applies to acts of forfeiture after the date of the Will in the testator's lifetime, as well as to acts after his death, ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, *e.g.*, a marriage of a kind forbidden by the testator: *Re Chapman*, [1904] 1 Ch. 431. Where a life interest is subject to forfeiture in the event of the tenant for life charging or incumbering the property, and there is a gift over on such forfeiture, a forfeiture will be produced by any charge or incumbrance, notwithstanding that in the events which happen there are no persons to take under the gift over: *Hurst v. Hurst*, 21 C. D. 278.

(*z*) *Wilson v. Greenwood*, 1 Swans. 471, 481; *Mackintosh v. Pogose*, [1895] 1 Ch. 505; *Re Johnson*, [1904] 1 K. B. 134.

(*a*) *Re Detmold*, 40 C. D. 585; *Re Brewer's Settlement*, [1896] 2 Ch. 503; *Re Johnson*, *ubi supra*; *Re Burroughs-Fowler*, [1916] 2 Ch. 251.

(*b*) *Ross v. Ross*, 1 Jac. & W. 154; *Cuthbert v. Purrier*, Jacob. 415; *Green v. Harvey*, 1 Hare, 428; *Borton v. Borton*, 16 Sim. 552; *Constable v. Bull*, 3 De G. & Sm. 411; *Watkins v. Williams*, 3 Mac. & G. 622; *Re Yalden*, 1 De G. M. & G. 53; *Hughes v. Ellis*, 20 Beav. 193; *Holmes v. Godson*, 8 De G. M. & G. 152; *Barton v. Barton*, 3 K. & J. 512; *Henderson v. Cross*, 29 Beav. 216; *Re Mortlock's Trust*, 3 Kay & J. 456; *Scott v. Josselyn*, 26 Beav. 174; *Perry v. Merritt*, L. R. 18 Eq. 152; *Re Wilcocks' Settlement*, 1 C. D. 229; *Shaw v. Ford*, 7 C. D. 669; *Re Percy*, 24 C. D. 616; *Re Parry and Daggs*, 31 C. D. 130. There is no distinction between realty and personality: *Shaw v. Ford*, *ubi supra*.

session by reason of the death of the legatee in the testator's lifetime the doctrine of repugnancy is not applicable and the gift overtakes effect (c).

It is now proposed to consider the performance of conditions: Performance of conditions precedent. And first, of conditions precedent: Although the general rule is, that they must be strictly performed (d), yet by the civil law, which has been, it would seem, in this respect also adopted by Courts of Equity, if the condition is performed *cy-près*, as it is termed, that is, so as *substantially* to fulfil the testator's intention, it may be sufficient (e).

As an example of the doctrine of the civil law may be mentioned a case put by Swinburne (f): If A. bequeath a legacy to B. in case he erect a monument to A. *within three days* after A.'s death; although B. should not literally comply with the condition, he would be entitled to the legacy upon building the monument within a reasonable time; since the erection would be considered as a motive and essence of the bequest and the time appointed for the building but a means to expedite the business. So, in Courts of Equity, where the condition requires a legatee to execute a release within a certain time, it has been held that if the release is in fact executed within a reasonable, though not within the specified time, the legatee will be entitled; on the principle that the period for executing the release was merely ancillary to the accomplishing of that object, and the procurement of that instrument was the end and substance of the condition (g). But where there is a condition precedent to the vesting of the interest of a devisee, and on his failing to perform the condition, the property is given over, that condition must be complied with strictly. If it is not so complied with, the property vests in the person in whose favour the gift over is

(c) *Re Stringer's Estate*, 6 O. D. 1; *Re Lowman*, [1895] 2 Ch. 348; *Re Dunstan*, [1918] 2 Ch. 304.

(d) *Robinson v. Wheelwright*, 21 Beav. 214; *Davis v. Angel*, 31 Beav. 223; *Priestley v. Holgate*, 3 Kay & J. 286; *Younge v. Furse*, 8 De G. M. & G. 756.

(e) Swinb. Pt. 4, s. 7, pl. 4. "Where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with, as nearly as it practically can be, or as it is technically called '*cy-près*.'" Story, Eq. Jur. s. 291.

(f) Pt. 4, s. 6, pl. 11.

(g) *Taylor v. Popham*, 1 Bro. O. C. 168; *Simpson v. Vickers*, 14 Ves. 341, 348; *Paine v. Hyde*, 4 Beav. 468; *Wilkins v. Knipe*, 5 Beav. 273; *Hollinrake v. Lister*, 1 Russ. 500; *Re Packard*, [1920] 1 Ch. 596.

made, and the Court cannot interfere to set up the prior gift (*h*).

The observance of the time mentioned in the condition may in any case be material to the due performance of it: as where the condition is that the legatee shall return to England within a time specified by the testator, and personally apply for his legacy (*i*). In *Hawkes v. Baldwin* (*k*), a testatrix gave legacies to A., B. and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate: Three years after the testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy: And Sir L. Shadwell, V.-C., held that she was not entitled to it, although she had been ignorant, until a short time before, that her sister was dead.

In what cases
apparent
conditions
precedent
shall be
regarded as
conditional
limitations,
and construed
according to
their substan-
tial effect.

Instances have however frequently occurred in which the Court has concluded, from the context of the Will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition, as a clause of *conditional limitation*, so as not to require, as in the case of a gift on a condition, that the very event, on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified, and so to the real intent of the testator. Thus, where

(*h*) The rule seems to be that "if the Court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach:" *Per* Lord Thurlow in *Taylor v. Popham*, 1 Bro. C. C. 167. See also *Hollinrake v. Lister*, *ubi supra*, at p. 508; *Ledward v. Hassell*, 2 K. & J. 370; *Re Packard*, *supra*.

(*i*) *Tulk v. Houlditch*, 1 Ves. & Beam. 248; *cf.* *Burgess v. Robinson*, 1 Madd. 172; *Tollner v. Marriott*, 4 Sim. 19; *Re Hartley*, 34 C. D. 742. As to what is a performance of such a condition, see *Tanner v. Tebbutt*, 2 Y. & Coll. Ch. C. 225; *Re Hodges' Legacy*, L. R. 16 Eq. 92. The performance of the condition is not affected by the ignorance of the legatee, the principle being that a person who takes by gift under a Will cannot plead want of knowledge of the contents of the Will as an excuse for not complying with its provisions: *Astley v. The Earl of Essex*, L. R. 18 Eq. 290; *Powell v. Rawle*, L. R. 18 Eq. 243. The executor owes no duty to the legatee to give notice of the terms of the legacy even though he takes a beneficial interest in the legacy on the breach of the condition: *Re Lewis*, [1904] 2 Ch. 656; *Re Mackay*, [1906] 1 Ch. 25; and see *O'Higgins v. Walsh*, [1918] 1 Ir. 126.

(*k*) 9 Sim. 355; *Powell v. Rawle*, *ubi supra*.

a testator devised to the child of which his wife was pregnant, *and if any such child died under twenty-one*, then over; the devise over was held good, though the wife proved not to have been *enceinte* (l). So where there was a devise, on condition that the devisee should give a release within three months after the testator's decease, *and if he should neglect to give such release*, then over; and the devisee died in the testator's lifetime; it was held, that this was a conditional limitation, and not a case of condition, and that the devise over took effect (m). Again, where the gift was to the testator's children surviving him, *and if they all died under twenty-one*, then over; and the testator died without leaving, or ever having had, any children, the bequest over was held good (n). Again, a bequest, "*in case I shall have but one child living at the time of my decease*, or all but one die under twenty-one and unmarried," was established in the event of the testator's death, never having had any child (o). Again, where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that, in the event of her marrying, the property should go over to others, although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect even though the tenant for life does not marry (p). So, where there was a bequest of stock, in trust for three legatees in equal shares to be transferred to them when they should attain twenty-one, but if any of them "*shall die*" under that age unmarried then his share to go to the survivors; and one of the three legatees was already dead at the date of the Will: it was held that the survivors were entitled to his share: For

(l) *Jones v. Westcombe*, 1 Eq. Cas. Abr. 245. See also *Statham v. Bell*, Cowp. 40; *Gulliver v. Wickett*, 1 Wils. 105 (where the question arose on the same Will as in *Jones v. Westcombe*); *Foster v. Cook*, 3 Bro. O. O. 247; *Re Green's Estate*, 1 Drew. & Sim. 68; *Warren v. Rudall*, 4 Kay & J. 603; *Wing v. Angrave*, 8 H. L. O. 183, 200; *Hall v. Warren*, 9 H. L. O. 420; *Tennant v. Heathfield*, 21 Beav. 255; *Re Betty Smith's Trusts*, L. R. 1 Eq. 79.

(m) *Avelyn v. Ward*, 1 Ves. Sen. 420. See also *Doe v. Scott*, 3 M. & S. 300.

(n) *Meadows v. Parry*, 1 V. & B. 124. See also accord., *Lanphier v. Buck*, 2 Dr. & Sm. 484.

(o) *Murray v. Jones*, 2 V. & B. 313. See also *Brock v. Bradley*, 33 Beav. 670; *Re Laing*, [1912] 2 Ch. 386.

(p) *Eaton v. Hewitt*, 2 Dr. & Sm. 184; *Underhill v. Roden*, 2 O. D. 494; *Stanford v. Stanford*, 34 O. D. 362; *In the goods of Griffiths*, [1917] P. 59. As to the class to take under the gift over, see *Re Warner*, [1918] 1 Ch. 368.

that in the case of a conditional limitation such as this, the Will is to be construed according to the sense and intention of the testator, that intention being, that if, in any event, the first limitation cannot take place, the subsequent one shall (*q*).

Accordingly, in *Mackinnon v. Sewell* (*r*), a testatrix bequeathed the residue of her estate, in trust for her daughter Caroline for life, and after her death, for her daughter Caroline's daughter, if she should survive her mother and attain twenty-one, but in case she should not survive her mother and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and *if all such other children* of the testatrix's said daughter *should die before attaining twenty-one*, then in trust for Louisa Mackinnon: The grand-daughter attained twenty-one, but did not survive her mother: Another child of the testatrix's daughter attained twenty-one, but did not survive his mother: Afterwards the daughter died: And Sir L. Shadwell, V.-C., and subsequently Lord Brougham, on appeal, held that the bequest over to Louisa Mackinnon took effect; for that it was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one: His Lordship, in giving his elaborate judgment, stated, that in order to support the decree, the Court must be satisfied, and had satisfied itself, First, that the words, "all such other children" of the testatrix's daughter, described one class of her children, viz., those who survived her: Secondly, that a clause so construed might be taken upon the authorities, as only apparently a condition, but really a limitation: The learned judge further stated, in the course of his judgment, that all or almost all the cases, upon which this doctrine is founded, are referable to one consideration, which it was very material to keep in view, viz., the construction which they authorize is never inconsistent with, far less contrary to, the plain intention of the clause itself, but only aids or furthers that intention, by supplying a manifest omission: in other words, no real difference is made in the result; for the event contemplated has not happened, but something equivalent has taken place: His Lordship added, that almost all the cases are

(*q*) *Re Sheppard's Trust*, 1 Kay & J. 269.
 (*r*) 5 Sim. 78; 2 M. & K. 229.

those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened: Thus a bequest over to A., *in case* the first takers, *the unborn children of B., die before they reach twenty-one*, read as a condition is a bequest to A., if B. has children and they do not live to twenty-one; and the first or affirmative contingency not happening, it follows of necessity, that the second or negative must: If it is read as to its substance and import, and not resolved into its parts, the bequest is, *in case no child of B. reaches majority*: and of course none can, if he have none(s). But wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be understood to have been substantially complied with by the event which has actually happened, the gift over fails (*t*).

Again, it must not be understood with regard to cases such as these, that if from any cause whatever, the prior gift cannot take effect, the second or alternative gift is for this reason to become operative; for it would be making, not construing the testator's Will, if this were to be allowed in any event not expressly or impliedly indicated by the language used by him. Accordingly in *Underwood v. Wing* (*u*), where there was a bequest to the testator's wife absolutely, and in case she should die in his lifetime, then over; and he and she were drowned at sea, under circumstances which made it impossible to prove that she died before him; it was held by Romilly, M. R., and by Lord Cranworth, C., on appeal, that the gift over failed; inasmuch as it was made dependent on an event which had not been proved to have happened, viz., the testator surviving his wife: and that it did not become operative from the mere fact of the gift to the wife failing to have practical operation; for the testator had indicated no such intention, either expressly or impliedly.

With respect to the performance of conditions subsequent, the general rule is, that they are to be construed with great

Performance
of conditions
subsequent.

(s) This case was acted on, and applied to the case of a pecuniary legacy, by Lord Langdale, in *Wilson v. Mount*, 2 Beav. 397. See also *Aiton v. Brooks*, 7 Sim. 204.

(t) See *Doe v. Shipphard*, 1 Dougl. 75; *Doo v. Brañant*, 4 T. R. 706, and the other cases collected, *ante*, pp. 970, 971; *Toldervy v. Colt*, 1 M. & W. 250; *Dicken v. Clarke*, 2 Younge & Coll. 572; *Lenox v. Lenox*, 10 Sim. 400.

(u) 4 De G. M. & G. 633.

All the events
must happen.

strictness, as they go to divest estates already vested: Therefore the very event must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy. Thus, if legacies be given to two persons, and *if either die during the life of A., then to the survivor living at the death of A.*, and both the legatees die before A., the personal representatives of both will be entitled: for the legatees took vested interests at the death of the testator, subject to be divested in favour of the survivor who might be living at the decease of A.; but as there was no such survivor *at that period*, the divesting contingency never happened (*x*). So where there was a bequest to A. of the interests and dividends of personal property for life, and then to be divided equally amongst her three children, *or such of them as should be living at her death*, and the children *all* died in the lifetime of the tenant for life, it was held, that they took vested interests, transmissible to their representatives: for the vested interests first given by the Will were, by the form of the expression, only defeated in case there should be some or one, and not all, of the children living at the mother's death: but that event did not happen, for there was not one child then living (*y*).

Condition
subsequent of
death of lega-
tee before his
legacy be-
comes "pay-
able."

And here it may be mentioned, that if a legacy is given to A. for life, and after his death, to his children at majority or marriage, with a gift over in the event of any one of them dying before his or her share becomes "*payable*," the Court will lean strongly (particularly in the case of a Will making a provision for children) in favour of construing the word payable to refer to the majority or marriage of the legatees and not to the period of distribution; so that if any one of the children should happen to die, after having attained majority or married, in the lifetime of the tenant for life, the

(*x*) *Harrison v. Foreman*, 5 Ves. 207. See also *Page v. May*, 24 Beav. 325.

(*y*) *Sturges v. Pearson*, 4 Madd. 411. And this doctrine applies to contingent as well as vested interest: *Wagstaff v. Crosby*, 2 Coll. 746; *Re Sanders' Trusts*, L. R. 1 Eq. 675. For further instances, see *Wall v. Tomlinson*, 16 Ves. 413; *Hervey v. McLaughlin*, 1 Price, 264; *Skey v. Barnes*, 3 Meriv. 335; *Laffer v. Edwards*, 3 Madd. 210; *Browne v. Lord Kenyon*, 3 Madd. 410; *Whittell v. Dudin*, 2 Jac. & Walk. 279; *Jones v. Bromley*, 6 Madd. 137; *Schnell v. Tyrrell*, 7 Sim. 86; *Meyer v. Townsend*, 3 Beav. 443; *Belk v. Slack*, 1 Keen, 238; *Locker v. Bradley*, 5 Beav. 593; *Campbell v. Brownrigg*, 1 Phil. Ch. O. 301; *Templeman v. Warrington*, 13 Sim. 267, followed in *Re Firth*, [1914] 2 Ch. 386; *Kimberley v. Tew*, 4 Dr. & W. 139; *Cohen v. Waley*, 15 Sim. 318; *Re Clark's Trusts*, L. R. 9 Eq. 378.

legacy shall not go over, but shall be considered as having vested absolutely at the majority or marriage (z).

A condition that the legatee shall not dispute the Will, is valid in law, (a), though it has been, in general, considered as *in terrorem* merely (b), and will not operate as a forfeiture by

Condition not to dispute the Will.

(z) *Hallifax v. Wilson*, 16 Ves. 168; *Jones v. Jones*, 13 Sim. 561; *Butterworth v. Harvey*, 9 Beav. 130; *Hayward v. James*, 28 Beav. 523; i.e., the word "payable" is construed as "vested"; *Haydon v. Rose*, L. R. 10 Eq. 224; *Partridge v. Baylis*, 17 O. D. 835; but see *Bright v. Rowe*, 3 M. & K. 316; *Creswick v. Gaskell*, 16 Beav. 577. A similar construction has prevailed as to marriage settlements; *ante*, p. 996 *et seq.*

(a) *Cooke v. Turner*, 15 M. & W. 727. *Secus*, where the condition is so worded, that it would prevent the legatee from taking any legal proceedings necessary for the protection of his rights: *Rhodes v. Muswell Hill Co.*, 29 Beav. 560; *Re Williams*, [1912] 1 Ch. 399.

(b) There is no absolute rule of law that a condition subsequent shall operate merely *in terrorem*, unless the legacy is given over to another on breach of the condition: Therefore, where there was a condition subsequent in a Will, revoking a bequest to the testator's daughter in case she became a nun, Lord Cranworth held that the condition was a lawful one, and that her interest ceased upon a breach of it, though there was no gift over: *Re Dickson's Trust*, 1 Sim. N. S. 37. His Lordship, in his judgment in this case, explains the grounds on which such a rule has been introduced with respect to conditions not to dispute the Will, and conditions in restraint of marriage. The law, however, construes forfeiture clauses strictly, and will not enforce such a clause unless the defeasance fits the condition. If the forfeiture clause does not provide for the contingency which has actually happened, the clause will be void. Thus in the case of *Musgrave v. Brooke*, 26 C. D. 792, where an estate was given in fee, a clause providing that if the devisee did not take the name of "Jones" the estate should go over to those entitled in remainder was held absolutely void because there could be no such persons. This case followed *Re Catt's Trust*, 2 H. & M. 46, which laid down that a clause of this kind, the intention of which is to defeat one estate and give the subject-matter over, must be construed most strictly, and must be free from ambiguity, and further that both limitations, the cesser and the limitation over, must fit in with one another. An absolute gift, however, of personalty can be qualified by a divesting clause on failure to assume or discontinue to use testator's name and arms, provided the rule against perpetuities is not infringed, and provided there is a gift over which fits the condition: *Re Cornwallis*, 32 C. D. 388.

And in a case in which a gift over of personalty was to the person who, if the limitation in the Will had been undisturbed by any disentailing (i.e., not disturbed, as the limitations in fact were), would have been next in succession to take the real estates, the gift over was held good, and the forfeiture clause enforceable. See also *Re Potts*, 1 H. L. C. 671; *Hogg v. Jones*, 32 Beav. 45. The forfeiture clause will be void if the gift over violates the rule against perpetuities, *Hodgson v. Halford*, 11 O. D. 959; in which case a clause whereby a legatee forfeited his share in a fund if he forsook the Jewish and adopted the Christian or any other religion was held not to be void as against public policy: cf. *Wainwright v. Miller*, [1897] 2 Ch. 255; *Re Gage*, [1898] 1 Ch. 498.

reason of the legatee's having disputed the validity (c) or effect (d) of the Will.

But where the legacy is given over to another person, in case of a breach of such condition, then if the legatee controvert the Will, his interest will cease and vest in the other legatee (e). If indeed the legacy, instead of being given to a stranger, is limited over to the executors in the event of the condition being broken, such condition is still merely regarded as *in terrorem*, and not obligatory (f). Yet if the testator direct the legacy to fall into *the residue* upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy: and, as such, will be entitled to it, if the condition is broken (g).

A condition that if administration proceedings should be commenced by any beneficiary as plaintiff the costs of all parties should be paid out of the plaintiff's share, does not apply to an action based on wilful default, and if applicable would be void for repugnancy (h).

Conditions in
restraint of
marriage:

As conditions in restraint of marriage are of no infrequent occurrence and form a subject on which numerous decided cases may be found, it may be expedient to apply to them, separately, some of the rules of law already mentioned with respect to conditional legacies generally.

when valid:

First, with regard to the legality of such conditions. By the doctrine of the civil law, which seems at one time to have been adopted by the Ecclesiastical Courts of this kingdom, and in a great measure by the Courts of Equity, all conditions in restraint of marriage were regarded as illegal, and legacies were discharged of such conditions, whether precedent or subsequent (i). But the ancient rule has been greatly relaxed in modern times; and it is now settled, that conditions which do not directly or indirectly import an *absolute injunction to celibacy*, are valid (j). Thus conditions restraining marriage under twenty-one, or other reasonable age, without consent of

(c) *Powell v. Morgan*, 2 Vern. 90; *Loyd v. Spillett*, 3 P. Wms. 344.

(d) *Morris v. Burroughs*, 1 Atk. 404.

(e) *Cleaver v. Spurling*, 2 P. Wms. 528; *Cooke v. Turner*, 15 M. & W. 727.

(f) *Cage v. Russel*, 2 Vent. 352.

(g) See *Lloyd v. Branton*, 3 Meriv. 118.

(h) *Re Williams*, [1912] 1 Ch. 399.

(i) See the judgment of Lord Thurlow, in *Scott v. Tyler*, 2 Dick. 720.

(j) *Scott v. Tyler*, 2 Dick. 721, by Lord Thurlow.

executors, guardians, &c. (*k*), or requiring or prohibiting marriage with particular persons (*l*), and the like, are valid and legal conditions.

Still the law will not allow *conditions* in absolute restraint of marriage: And accordingly it has been held, in the instance of a condition subsequent, that it was altogether void, and that the legatee should retain the interest given to him, discharged of the condition (*m*), notwithstanding a gift over. A condition subsequent in restraint of marriage is, however, only *primâ facie* and not *per se* void (*n*).

It is not, however, to be understood, that where property is limited to a person until that person marries, and when such marriage happens, then over, such *limitation* may not be valid (*o*). In *Morley v. Rennoldson* (*p*), Wigram, V.-C., said that he was satisfied, from an examination of the authorities, that a gift until marriage, and when the party marries, then over, is a valid limitation (*q*). And his Honour added, that in the case of a widow there was no question of the validity of such a limitation (*r*).

(*k*) *Hemmings v. Munckley*, 1 Bro. C. C. 303; *Scott v. Tyler*, 2 Bro. C. C. 431; *Stackpole v. Beaumont*, 3 Ves. 89; *Clifford v. Beaumont*, 4 Russ. Chanc. Cas. 325; which must be considered as overruling *Underwood v. Morris*, 2 Atk. 184. See the judgment of Lord Campbell in *Beaumont v. Squire*, 17 Q. B. 932, 933.

(*l*) *Scott v. Tyler*, 2 Dick. 721. by Lord Thurlow; *Perrin v. Lyon*, 9 East, 170 (in which case the restraint was from marrying a Scotchman); *Randall v. Payne*, 1 Bro. C. C. 55; *Hodgson v. Hatford*, 11 C. D. 959 (in which case the restraint was from marrying a Jew); *Jenner v. Turner*, 16 O. D. 188 (in which the restraint was from marrying a domestic servant or person who had been a domestic servant); *Duggan v. Kelly*, 10 Ir. Eq. 295 (in which the restraint was from marrying a Papist).

(*m*) *Morley v. Rennoldson*, 2 Hare, 570; [1895] 1 Ch. 449; *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bellairs v. Bellairs*, L. R. 18 Eq. 510. But it was held by Wood, V.-O., in *Newton v. Marsden*, 2 Johns. & H. 356 (in which case the authorities as to the validity of a condition in restraint of marriage are fully reviewed), that a condition that the trusts for the benefit of a widow should cease if she married, was valid. A condition that a widow shall not marry is valid: *Lloyd v. Lloyd*, 2 Sim. N. S. 255.

(*n*) *Re Hewett*, [1918] 1 Ch. 458.

(*o*) King Edward VI. granted to his sister, the Lady Mary, the manor of D., so long as she should continue unmarried: This was admitted to be a good limitation, but no condition: Fulbecke's Parallels, 47, edit. 1618.

(*p*) 2 Hare, 580.

(*q*) See also *Webb v. Grace*, 2 Phillim. 701; *Godfrey v. Hughes*, 1 Robert. 593; *Heath v. Lewis*, 3 De G. M. & G. 954; *Evans v. Rosser*, 2 Hemm. & M. 190; *Jones v. Jones*, 1 Q. B. D. 279; *Montgomery v. Potterton*, [1918] 1 Ir. R. 41; *Re Hewett*, [1918] 1 Ch. 458.

(*r*) Such a limitation is also valid in the case of a widower: *Allen*

Where by a post-nuptial settlement a husband assigned leaseholds to trustees, upon trust to pay the rents to his wife for life, or so long as she should continue the co-habiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife, the husband took an interest in the settled property, the restriction of the wife's enjoyment of the rents to the period of co-habitation was held not to be void as against the policy of the law, and the trust in her favour was therefore held to be determined upon her ceasing to live with her husband (s).

It may be here observed that a gift to an "unmarried" person cannot be construed to mean a gift to that person so long as he shall remain unmarried: And therefore if a testator bequeaths a fund to his "unmarried children," if once a child is entitled to participate by filling the character of an unmarried child, he or she will not lose that right by his or her subsequent marriage (t).

But where a testator left a legacy to his wife "so long as she should continue his widow and unmarried," it was held that the wife having been divorced was not entitled, since widowhood was part of the condition, and she did not at the testator's death fill that position (u).

without
consent :

With respect, moreover, to *conditions* in restraint of marriage *without consent*, not under the age of twenty-one, or other reasonable age, but *generally*, such conditions, like those just mentioned in restraint of litigating the Will, are regarded as a declaration of the testator *in terrorem* merely, if there is no disposition over (v), and whether precedent (x) or

v. *Jackson*, 1 O. D. 399. See further, as to limitations *durante viduitate*, *Rishton v. Cobb*, 9 Sim. 615; 5 M. & Cr. 145 (distinguished in *Re Mason*, [1910] 1 Ch. 695, and *M'Calmont v. Barklie*, [1917] 1 Ir. R. 1); *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Bullock v. Bennett*, 1 Kay & J. 315. But in *Marples v. Bainbridge*, 1 Madd. 590, Sir T. Plumer rejected the distinction between a condition and limitation. See *Rishton v. Cobb*, 5 M. & Cr. 152. In *Jones v. Jones*, 1 Q. B. D. 279, it was pointed out that the above distinction, whatever the bequest amounted to, whether to a condition or only to a limitation, does not apply to a case of realty.

(s) *Re Hope Johnstone*, [1904] 1 Ch. 470; cf. *Re Lovell*, *ante*, p. 1009.

(t) *Jubber v. Jubber*, 9 Sim. 503. See *Hall v. Robertson*, 4 De G. M. & G. 781. As to the meaning given to the word "unmarried" in modern decisions, see *ante*, p. 862, note (a).

(u) *Re Boddington*, 25 O. D. 685.

(v) See, however, *ante*, p. 1019, note (b).

(x) *Harvey v. Aston*, Com. Rep. 728, by Comyns, C. B.: *Reynish*

subsequent (*y*), are inoperative for the vesting or divesting of the legacy. But if there be a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory: for the Court is bound to protect the interest of the party in whose favour the ulterior limitation is made (*y*). A mere gift of the residue to a particular person will not be considered such a limitation (*z*), unless the testator also directs the legacy to fall into the residue in case of breach of the condition (*a*).

Provisions of this kind may be sometimes entirely rejected as being inapplicable. Thus in *Crommelin v. Crommelin* (*b*), provisions in a father's Will respecting his daughter's marriage were held not to apply to a daughter who, having married in her father's lifetime, after his death married a second time. Again, in *Bird v. Hunsdon* (*c*), a direction to pay interest to a legatee so long as she remained single, with a gift over on her death, was held to give to the legatee the interest for life, notwithstanding her marriage (*d*).

Next, concerning the performance of conditions in restraint of marriage. In the instances of conditions requiring marriage with consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage; for a subsequent approbation by the executors, &c., will not be a performance of the condition (*e*). Again, the consent of all the

when rejected
as inapplicable.

Performance
of conditions
in restraint
of marriage:
when consent
to be
obtained:
of whom:

v. Martin, 3 Atk. 331, by Lord Hardwicke; *Malcolm v. O'Callaghan*, 2 Madd. 353, by Sir T. Plumer. But it has been doubted whether a condition *precedent* requiring the consent of the executors, &c., to the marriage of the legatee, generally, be not operative, whether the legacy be limited over or not: see the observations of Lord Eldon in *Clarke v. Parker*, 19 Ves. 15; and those of Sir Wm. Grant in *Lloyd v. Branton*, 3 Meriv. 116. In *Re Nourse*, [1899] 1 Ch. 63, the question was, what is the effect of a gift to a son in any event with the addition of a larger gift in the event of his marrying with consent? Stirling, J., applying *Scott v. Tyler*, 2 Dick. 720, and *Gillet v. Wray*, 1 P. Wms. 284, and distinguishing *Reynish v. Martin* (*ubi supra*), held that the condition as to consent was not in *terrore*, and was valid.

(*y*) *Stratton v. Grimes*, 2 Vern. 357; *Wheeler v. Bingham*, 3 Atk. 367, by Lord Hardwicke; *Malcolm v. O'Callaghan*, 2 Madd. 353, by Sir T. Plumer; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

(*z*) *Wheeler v. Bingham*, 3 Atk. 364.

(*a*) 3 Atk. 368; *Lloyd v. Branton*, 3 Meriv. 118, *ante*, p. 1020, note (*g*).

(*b*) 3 Ves. 227. See also *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 Ves. & B. 479; *post*, p. 1025, note (*q*); *Rishton v. Cobb*, 5 M. & Cr. 145.

(*c*) 2 Swanst. 342.

(*d*) See *Bullock v. Bennett*, 1 Kay & J. 315, reversed 7 Do G. M. & G. 283.

(*e*) *Reynish v. Martin*, 3 Atk. 331; *Clarke v. Parker*, 19 Ves. 21;

consequence
of death of
one of several
whose consent
is required :

executors or trustees must be obtained (*f*); though where one of them is dead, if the condition is precedent, it would seem that the consent of all the survivors is sufficient (*g*): But if the condition is subsequent, and consequently marriage without the consent of several persons is to divest the legacy, the death of all (*h*) or one of them will discharge the condition altogether (*i*).

Long v. Ricketts, 2 Sim. & Stu. 179. Although the word "*approbation*" be also used, it would seem that the same rule must prevail: *Malcolm v. O'Callaghan*, 2 Madd. 353; *Clarke v. Parker*, 19 Ves. 21. But see *Burleton v. Humphrey*, Ambl. 256, *contra*, where "*approbation*" was held to include *subsequent* approval.

(*f*) *Clarke v. Parker*, 19 Ves. 17. The marriage may be presumed to have been by consent after a lapse of time: *Re Birch*, 17 Beav. 358. Where a marriage is required to be with the consent of trustees generally it is sufficient if the marriage be had with the consent of such of the persons named trustees as accept the office: *Worthington v. Evans*, 1 Sim. & Stu. 165.

(*g*) *Dawson v. Oliver-Massey*, 2 C. D. 753, in which case it was suggested by James, L. J., that where the consent had to be that of parents if both were dead the legacy was discharged of the condition. But in *Re Brown's Will*, 18 C. D. 61 (where the same learned judge seems to throw doubt on his own dictum, which, at all events, can only apply to parents), a testator appointed his wife sole guardian of his infant children, and bequeathed a legacy to each of his daughters on her attaining twenty-one years or marrying with the consent of her "guardian or guardians," which should first happen. He gave the residue to his wife for life, and after her death gave a further legacy to each daughter who should attain twenty-one or marry with the consent of her guardian or guardians. After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians, there being none. It was held that the condition was not complied with, it not being made inoperative by there being no guardians, since guardians could have been appointed by the Court; and the testator on the language of his Will must be taken to have contemplated such an appointment. See also *Green v. Green*, 2 J. & Lat. 529.

The question may arise whether in a case where the consent of the executors is necessary the power to give this consent vests upon the death of all the executors in the representative of the survivor (together with the general duties and powers of an executor), or whether it is confined to the executors and survivor of them personally, and so terminates with the death of the last of those to whom it was originally given. On this point Lord Eldon, in the case of *Grant v. Dyer*, 2 Dow. 84, is reported to have said that "the general course of decisions go to confine the power of giving or withholding consent to those who are personally named, and *not* to extend it to the representatives." As to whether a power is personal or annexed to the office, see *Re Smith*, [1904] 1 Ch. 139, *ante*, p. 200.

(*h*) *Graydon v. Hicks*, 2 Atk. 18; *Aislabie v. Rice*, 3 Madd. 256; *Grant v. Dyer*, 2 Dow, Parl. O. 73.

(*i*) *Peyton v. Bury*, 2 P. Wms. 626. See accord. *Collett v. Collett*, 12 Jur. N. S. 180, *coram* Lord Romilly. In that case the legacy was given, payable on the legatee's attaining twenty-one or marrying with her mother's consent: The mother died, and then the legatee, being still an infant, married: and it was held that this was a condition subsequent, which was discharged by the mother's death.

The next consideration is, what will be a sufficient consent: It has been decided, that a general consent, given to the legatee after attaining majority, will be sufficient (*k*); and further, that an unconditional consent, once given, cannot be retracted (*l*); unless for good reasons, moral or pecuniary, afterwards discovered (*m*). But the power of retractation is not unlimited, and cannot be exercised for mere caprice or without just and exceptional reasons (*n*). The consent may, however, be conditional: and then it will be sufficient or not, according as its condition is or is not performed (*o*). Again, it has been held that consent may be implied, as from the circumstance that the executor or trustee witnesses the reception of addresses of marriage, and intimates no disapprobation; for then the maxim *qui tacet, salis loquitur*, applies (*p*). Lastly, if the legatee married in the lifetime of the testator with his consent, or subsequent approbation, that is equivalent to a marriage after his death with the consent of his executors, &c. (*q*).

what consent
sufficient:

A first marriage with consent is a sufficient performance of the condition: and therefore a second marriage without consent, though in the lifetime of the executor or other individual whose assent is required in the condition, will incur no forfeiture (*r*).

second marriage without
consent after
a first with
consent:

If a bequest is made to a legatee at twenty-one, or upon marriage with consent, with a clause of forfeiture upon marriage without consent, if the legatee attains twenty-one, the condition is extinct, and a subsequent marriage without consent is no forfeiture (*s*). Again, where a bequest was made in trust for

legacy at
twenty-one or
on marriage
with consent:

(*k*) *Mercer v. Hall*, 4 Bro. O. C. 328; *Pollock v. Croft*, 1 Meriv. 181.

(*l*) *Strange v. Smith*, Ambl. 263; *Merry v. Ryves*, 1 Eden, 1; *Dashwood v. Bulkeley*, 10 Ves. 242; *Le Jeune v. Budd*, 6 Sim. 441.

(*m*) *Dashwood v. Bulkeley*, 10 Ves. 230, 242, 243; *Re Brown*, [1904] 1 Ch. 120.

(*n*) *Re Brown, ubi supra*.
(*o*) *Dashwood v. Bulkeley*, 10 Ves. 230; *D'Aguilar v. Drinkwater*, 2 Ves. & Beam. 225.

(*p*) *Campbell v. Lord Netterville*, cited in 2 Ves. Sen. 530, and in 10 Ves. 243.

(*q*) *Clarke v. Berkeley*, 2 Vern. 720; *Parnell v. Lyon*, 1 Ves. & Beam. 472; *Wheeler v. Warner*, 1 Sim. & Stu. 304; *Smith v. Cowdery*, 2 Sim. & Stu. 358; *Re Park*, [1910] 2 Ch. 322; *Re Grove*, [1919] 1 Ch. 249.

(*r*) *Hutcheson v. Hammond*, 3 Bro. O. C. 128; *Crommelin v. Crommelin*, 3 Ves. 227.

(*s*) *Desbody v. Boyville*, 2 P. Wms. 547; *Knapp v. Noyes*, Ambl. 662. On the same principle, where the testator gave his daughter 400*l.* to be paid in twelve months after his death, but if she married John Osborn, then he revoked the legacy and gave her a shilling in lieu; and she married fourteen months after his death; Lord Rosslyn ordered her to be paid the legacy of 400*l.* with interest: *Osborn v. Brown*, 5 Ves. 527.

marriage without consent before attaining twenty-one, and subsequent attainment of that age:

A. when and so soon as he attained twenty-one, or married before that age with consent of guardians; but if he should not attain twenty-one, or marry before that age without such consent, then over; Sir William Grant held, that on attaining twenty-one, A. was absolutely entitled, although he had *previously* married without consent (t). Where the bequest was to A. *to be paid at twenty-one or marriage*, but if A. died under twenty-one, or married without the consent of B., then over, Lord Hardwicke held that marriage during minority, without consent, was a forfeiture (u). The distinction between these two cases may, perhaps, be discovered by considering, that in the former case the legacy is given on a condition *precedent*, upon the happening of one of two events, viz., marriage with consent or the attainment of twenty-one, and the legacy vests, if either contingency happens; whereas in the latter, the condition is *subsequent* and the vested interest to be determined, if either of two events happens, viz., his death before twenty-one, or marriage without consent (x).

unreasonable refusal of consent by executor, &c., controlled by the Court.

Before leaving this subject, it must be observed, that if an executor or trustee, whose consent is required by the Will to the marriage of a legatee, refuse to execute his power by consenting, the Court will direct an inquiry into the proposed marriage, and as to its propriety; and further, if the marriage should be found suitable, will receive proposals for a settlement on the legatee and issue of the marriage (y).

Legacies to executors:

In conclusion of the subject of conditional legacies, it will be proper to advert to the rules established with respect to legacies given to executors.

given in that character are on condition of accepting the office:

Where legacies are given to persons, in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, viz.: that the parties clothe themselves with the character in respect of which the benefits were intended for them (z). “Nothing is so

(t) *Austen v. Halsey*, 13 Ves. 125. See also *Knight v. Cameron*, 14 Ves. 389; *Collett v. Collett*, 12 Jur. N. S. 180, by Lord Romilly, M. R.

(u) *Chauncey v. Graydon*, 2 Atk. 616.

(x) If a legacy should be given payable upon marriage with consent of trustees under twenty-one; and the legatee marry without consent under twenty-one, and then marry a second time, having attained majority; it may be questioned, whether on such second marriage, the legatee would become entitled to the legacy: *Clifford v. Beaumont*, 4 Russ. Chanc. Cas. 325. But see *Beaumont v. Squire*, 17 Q. B. 905.

(y) *Clarke v. Parker*, 19 Ves. 18, 19; *Goldsmid v. Goldsmid*, 19 Ves. 368.

(z) *Abbot v. Massie*, 3 Ves. 148; *Freeman v. Fairlie*, 3 Meriv. 31.

clear," said Lord Alvanley, in *Harrison v. Rowley* (a), "as that if a legacy is given to a man, as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor" (b).

It has, however, been held on two occasions (c), by Shadwell, V.-C., that this rule does not extend to the case of a residue: and his Honour said there was no case which decided that an executor should be deprived of his right to a residue, or a share of a residue, given to him, because he did not prove the Will.

but rule does
not extend to
a residue:

In order to make a proper application of this rule, two inquiries are necessary: First, When shall a legacy be regarded as given to a man *in the character of executor*: Secondly, What shall be a sufficient assumption of the character of executor to entitle the legatee, when a legacy is so given.

First, when a legacy shall be regarded as given to a legatee in the character of executor: The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the Will, to repel that presumption (d). Thus, in *Reed v. Devaynes* (e), the testator gave legacies to certain persons by the description of "my very good friends," and in the further part of the Will desired them to act as executors: One of those persons, who had not proved the Will, or acted as executor, claimed his legacy: But Lord Alvanley said, that an executor so appointed could not claim his legacy without acting, or at least proving the Will. So in *Stackpoole v. Howell* (f), the testator devised his real and personal estates to the plaintiff, and the defendants Howell and Maberly, upon various trusts, and appointed them executors:

where a
legacy is to
be regarded
as given to
an executor
in that
character:

(a) 4 Ves. 216.

(b) It will make no difference that the executor is aged and incapable by bodily and mental infirmities of proving the Will: *Hanbury v. Spooner*, 5 Beav. 630; *Re Hawkins' Trust*, 33 Beav. 570. But he may prove it at any time, even after the hearing: *Reed v. Devaynes*, 2 Cox, 285; *post*, p. 1030, note (t).

(c) *Griffiths v. Pruett*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 264. See also *Compton v. Bloxham*, 2 Coll. 201; *Re Maxwell*, [1906] 1 Ir. R. 386.

(d) *Stackpoole v. Howell*, 13 Ves. 417; *Re Appleton*, 29 C. D. 893. Parol evidence is admissible to rebut this, as well as every other, presumption: *Re Appleton*, *ibid.*, *per* Cotton, L. J., 895; Fry, L. J., *dubitante*. The former learned judge, as will be seen, doubts the qualification contained in the words of the text "arising on the Will."

(e) 3 Bro. C. C. 95. See *post*, p. 1030, note (r).

(f) 13 Ves. 417.

He afterwards made two codicils by which he gave to those three persons legacies, not expressly as trustees or executors, but by their names and descriptions: and the legacies by the first codicil were classed together, and of equal amounts, as were those in the second: The plaintiff renounced probate, and he nevertheless claimed the legacies: But Sir Wm. Grant held, that he was not entitled. Again, in *Piggott v. Green (g)*, a testatrix gave legacies of 100*l.* each to A., B., and C., and in a subsequent part of her Will she appointed them her executors: In the preceding clauses, she made devises and bequests "to her executors thereafter named," and "to her executors and trustees:" A. neither proved nor acted: and Sir L. Shadwell, V.-C., held, that he was not entitled to the legacy (*h*).

but presumption
capable
of being
rebutted.

But this presumption will be rebutted, if it should appear, either from the language of the bequest, or from the fair construction of the whole Will (*i*), that the bequest to a person, who is named executor, is given to him independently of that character; and then the legatee will be entitled to receive the legacy, whether he accepts the office or not (*k*). Thus, in *Humberston v. Humberston (l)*, the testator, as an encouragement to his executors (who were four) to accept the trust and executorship, gave to each of them 100*l.* and 12*l.* for mourning; and to each a ring, and 10*l.* a-year for their trouble: And Lord Chancellor Cowper held that, notwithstanding the condition of the acceptance might seem to run to all the legacies, yet the executors, though they did not act, should have their rings and mourning, these being intended for them immediately, and not to wait their time of acceptance; but that they should

(g) 6 Sim. 72.

(h) *Barber v. Barber*, 3 Mylne & Cr. 688. See also *Re Russell*, 56 S. J. 651, where the appointment of executor, though not the legacy, was revoked by codicil; cf. *Re Freeman*, [1916] 1 Ch. 681.

(i) But see *ante*, p. 1027, note (d), as to the suggested admissibility of parol evidence.

(k) The fact of a legacy being payable to a legatee (who is named as one of the executors) after the death of a tenant for life rebuts the presumption that the legacy was given to him in his character of executor: *Re Reeve's Trusts*, 4 C. D. 841. The mere fact, however, that the gift of the legacy precedes the appointment of the legatee as executor or that the legacies to several persons appointed executors differ either in their amount or subject matter is not enough by itself to rebut the presumption: *Re Appleton*, 29 C. D. 893. In this last decision the Court of Appeal questioned the case of *Jewis v. Lawrence*, L. R. 8 Eq. 345, in which it was held that the inequality in the subject matter of the bequests made to two legatees, each of whom was named executor, was sufficient to rebut the above presumption.

(l) 1 P. Wms. 333.

not have their 100*l.* and the annuity of 10*l.* each. So in *Dix v. Reed* (*m*), the testator made the following bequest:—"I give to William Reed and John Baugley 50*l.* each, whom I nominate and appoint executors in trust to this my Will: the said bequests to be upon condition of their taking upon them the trusts hereinafter mentioned:" In a subsequent part of the Will, the testator added, "I give unto my cousin, Thomas King, the sum of 50*l.*, whom I appoint as joint executor in trust in this my Will:" Reed and Baugley proved the Will; but King declined proving it, and did not interfere in the trusts: It was insisted that he was not entitled to the legacy of 50*l.*: The Master reported the legacy to be due, but an exception was taken to the report: And Sir John Leach, V.-C., overruled the exception, observing, that he considered the gift rather intended in respect of the legatee's relationship than of his office. So in *Bubb v. Yelverton* (*n*), where a testator appointed his "friend" P. his executor, and gave him a legacy "as a remembrance," and P. did not act as executor, it was held by Lord Romilly, M. R., that he was entitled to the legacy without proving the Will.

So in *Burgess v. Burgess* (*o*), a legacy given to the testator's trustees and executors, as a mark of his respect for them, was held by Knight Bruce, V.-C., not to be revoked by a codicil appointing other trustees and executors in their room, and giving a legacy of equal amount to the newly-appointed trustees and executors, in similar language (*p*).

Again, in *Cockerell v. Barber* (*q*), a testator, after giving a legacy to his friend and partner, Mr. Palmer, appointed him one of his executors, and made other devises and bequests in his favour, so that Mr. Palmer was entitled under the Will to much greater benefits than any of the other executors: By a codicil, in which Mr. Palmer was described as one of the executors, a further legacy was bequeathed to him: And Lord Eldon, C., held that these legacies were not given to him in his character of executor: But his Lordship took

(*m*) 1 Sim. & Stu. 237.

(*n*) L. R. 13 Eq. 131.

(*o*) 1 Coll. 367.

(*p*) See also *Compton v. Bloxham*, 2 Coll. 201, 202, where the same judge said that the Courts had struggled against the effect of a general rule, the propriety of which had been doubted. See also *Re Denby*, 3 De G. F. & J. 350.

(*q*) 2 Russ. Ohanc. Cas. 585.

occasion to lament the infringement of the old simple rule, that if a man was named executor, and had a legacy given to him, he should not have the legacy, if he did not take the office (*r*). So in *Wildes v. Davies* (*s*), where a testator by a codicil gave to M. 200*l.*, and named him joint executor with the executors in the Will; and in case the testator's son should die lunatic, then he gave 200*l.* to the said M.; it was held, by Stuart, V.-C., that the latter gift was not annexed to the office.

what is a
sufficient
assumption of
the office to
satisfy the
condition.

Secondly, What will be a sufficient assumption of the character of executor, to entitle the legatee, when a legacy is given to him in that character? If the legatee prove the Will with an intention to act under it, that will be a sufficient performance of the condition: or if he unequivocally manifest an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition (*t*). Thus in *Harrison v. Rowley* (*u*), the testatrix bequeathed to her executors 100*l.* each for their care and loss of time: One of the executors survived the testatrix so short a time, that he was prevented from joining with his co-executors in proving her Will, but he concurred with them in giving directions respecting her funeral, and in paying

(*r*) Lord Alvanley, in *Reed v. Devaynes*, 2 Cox, 285, said that he thought a child, who had a portion left him by a Will, in which he was appointed executor, could not take the portion unless he acted as executor: But this may be considered inconsistent with the more recent authorities: And the same remark, perhaps, applies to the principal decision of the same learned judge in *Reed v. Devaynes* (stated *ante*, p. 1027), inasmuch as it appears from the report in Cox, that the legacy was given to the executors, "as a mark of my gratitude for the friendship they have shown me:" which words, it would seem, would rebut the presumption that the bequest was given to them in their character of executors.

(*s*) 1 Sm. & G. 475; 22 L. J. Ch. 497. See *Re Appleton*, 29 O. D. 893, in which this case is explained.

(*t*) If an executor proves, and *bonâ fide* acts as such, any time before the real business of administering the estate is concluded, he is entitled to his legacy: *Angermann v. Ford*, 29 Beav. 349; *ante*, p. 1027, note (*b*). So where an executor, to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a power of attorney, under which another person administered the estate, and under which the rents of the real estate were received, and the executor died, without proving the Will, it was held by Malins, V.-C., that the executor had sufficiently shown an intention to act under the trusts of the Will, to entitle his representative to the legacy: *Lewis v. Mathews*, L. R. 8 Eq. 277.

(*u*) 4 Ves. 212.

certain sums for burial fees, making the coffin, and opening the vault, in consequence of those directions: And Lord Alvanley decided that his executors were entitled to the legacy. In this case his Lordship declined to determine whether, if the executor had died without knowing that he was appointed executor, or manifesting any intention to take upon him the trust (as if he had died at a distance, before the information reached him), he would have been entitled (*v*).

In *Hollingsworth v. Grasett* (*w*), a testator bequeathed his residuary estate to A., the executor and trustee of his Will; with a gift over in case of the death of A., *so that he might not be enabled* to perform the duties thereby required of him: A. proved the Will, but died before he had fully performed the trusts of it: And it was held by Sir L. Shadwell, V.-C., that A., by merely proving the Will, entitled himself to the residue absolutely.

But the conduct of an executor, after proving the Will may be such as to demonstrate, that instead of a *bonâ fide* intention to execute the trusts, he procured probate as a means of enabling him to violate, in the grossest manner, the confidence reposed in him by the testator: In such a case, the mere act of proving the Will cannot entitle him to the legacy meant for him. Thus in *Harford v. Browning* (*x*), Mr. Morris (one of four executors) had a legacy of 1,500*l.* and an annuity of 100*l.* given to him by the testator, upon proving the Will, and taking upon himself the execution of it: Morris concurred in the probate, and shortly afterwards eloped with, and married abroad, the infant daughter of the testator, who was beneficially interested under the Will: With the exception of probate, Morris never acted as executor, and in consequence of his misconduct, he was restrained by the Court of Chancery from interfering in the trust of the Will: And Lord Thurlow determined, that Morris's concurrence in the probate, under these circumstances, did not entitle him either to the legacy or the annuity.

In *Baker v. Martin* (*y*), a testator directed that 100*l.* should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs

Where an annuity given to an executor, "for his trouble," shall cease.

(*v*) 4 Ves. 215. In *Brydges v. Wotton*, 1 Ves. & Beam. 134, a trustee dying nineteen months after the testatrix, without having acted, was held entitled to the legacy given as a token of regard, and a recompense for his trouble; no refusal or neglect to act, where necessary, appearing: *Browne v. Browne*, [1912] 1 Ir. R. 272.

(*w*) 15 Sim. 52.

(*x*) 1 Cox, 302.

(*y*) 8 Sim. 25.

should take place: The executor proved and acted: Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding: Sir L. Shadwell, V.-C., held that the annuity did not cease on account of the institution of the suit.

Bequest of a
"handsome
gratuity" to
executors.

A request by a testator that a handsome gratuity should be given to each of his executors, is void for uncertainty (*z*). But a gift of reasonable remuneration to an executor for his trouble is effectual, and the Court will act on the measure of the bequest supplied by the testator, and ascertain how much ought to be expended (*a*).

Probate of the
Will is an
acceptance of
the office of
trustee.

In conclusion, it may be mentioned, that where personal property is bequeathed to executors as trustees, the probate of the Will is an acceptance of the trusts (*b*). But probate or letters of administration granted to the personal representative of a sole or last surviving trustee will not constitute him trustee of the settlement or Will creating the trust unless he elects to act as trustee (*c*), but having elected to act, he becomes trustee for all purposes (*d*). He cannot, however, insist upon acting if new trustees are appointed (*e*), and, on the other hand, he can refuse to act (*f*).

Liability of
executor
legatee
accepting the
office.

In the case of *Messenger v. Andrews* (*g*), a testator gave a specific bequest to A., and directed that, in consideration of the bequest, A. should pay his debts; and made A. his residuary legatee and executor: And Lord Lyndhurst, C., held, that the payment of the debts was a condition annexed to the specific bequest, and that if A. accepted the bequest, he was bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.

In *Henvell v. Whitaker* (*h*), the testator directed his just debts and funeral expenses to be fully paid and satisfied by his

(*z*) *Jubber v. Jubber*, 9 Sim. 503.

(*a*) *Jackson v. Hamilton*, 3 J. & Lat. 702; *Buckley v. Buckley*, 19 L. R. Ir. 544; Theobald on Wills, 7th edit. 757.

(*b*) *Mucklow v. Fuller*, Jacob, 198.

(*c*) *Re Benett*, [1906] 1 Ch. 216.

(*d*) *Re Waidanis*, [1908] 1 Ch. 123; *Re Howarth*, [1909] W. N. 30.

(*e*) *Re Routledge*, [1909] 1 Ch. 280; and see Conv. Act, 1911, s. 8, ante, p. 200.

(*f*) *Re Benett*, *ubi supra*.

(*g*) 4 Russ. Chanc. Cas. 478.

(*h*) 3 Russ. Chanc. Cas. 343. See also *Dover v. Gregory*, 10 Sim. 393, 399.

executor thereafter named: And Sir John Leach, M. R., held, that this was a condition imposed upon the executor, to satisfy the testator's debts and funeral expenses as far as all the property, which he derived under the testamentary disposition, would extend, whether real or personal.

In conjunction with the subject of conditional legacies, it may be proper to mention, that where there is a bequest of money to, or in trust for, legatees absolutely, but with a direction for the enjoyment or application of the money in a particular mode, for their benefit, as where it is given to purchase an annuity for the legatee (*i*), or to place him out apprentice (*j*), or to enable him to take holy orders (*k*), or "towards purchasing a country residence" (*l*), the legatees will be entitled to receive the capital money immediately, regardless of the particular modes directed for the enjoyment or application (*m*).

Legacies directed to be enjoyed in a particular mode, or applied in a particular way.

Cases also occur where the testator gives a present interest in money to a legatee, though the application of it is to be regulated by the discretion of some one else (*n*). As to such cases, the rule is, that where a legacy is given, but the application of it is prescribed by the testator himself, or left by him to the discretion of some other person if that discretion is not exercised, or an accident happens which prevents the employment of it in the way which is contemplated, the gift prevails: The mode of application may fail, but that will not interfere with the substance of the gift (*o*).

rule as to absolute gifts, with a revocation or qualification of them for purposes which fail.

But here it may be advisable to refer to an important distinction with respect to Wills in which there is first a gift absolute in form, and then a revocation or qualification of it for purposes which fail. As to such bequests, the rule is, that if the testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects

(*i*) *Ante*, p. 949: but the legatee is not entitled to receive the capital money where there is a conditional limitation cutting short the annuity on the happening of a specified event: *Hatton v. May*, 3 C. D. 148.

(*j*) *Barlow v. Grant*, 1 Vern. 255; *Nevill v. Nevill*, 2 Vern. 431; *Barton v. Cooke*, 5 Ves. 461.

(*k*) *Barton v. Cooke*, 5 Ves. 463, by Lord Alvanley.

(*l*) *Knor v. Hotham*, 15 Sim. 82.

(*m*) See also *Leves v. Lewes*, 16 Sim. 266; *Noel v. Jones*, *ibid.* 309; *Re Skinner's Trusts*, 1 Johns. & H. 102; *Re Johnston*, [1894] 3 Ch. 204; *Re Marshall*, [1914] 1 Ch. 192.

(*n*) *Gough v. Bult*, 16 Sim. 45.

(*o*) *Gough v. Bult*, 16 Sim. 54; by Lord Cottenham; *Lord Lonsdale v. Berchtoldt*, 3 Kay & J. 185; *Presant v. Goodwin*, 1 Sw. & Tr. 544.

for the benefit of the legatee—upon failure of such objects, the absolute gift prevails (*p*): But if there is no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it (*q*).

SECTION VII.

Cumulative Legacies.

Legacies are said to be cumulative, as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both, or one only: *i.e.*, whether

(*p*) *Campbell v. Brownrigg*, 1 Phill. 301; *Hancock v. Watson*, [1902] A. C. 14, 22, where Lord Davey says: "For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or validity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be." *Re Currie*, [1910] 1 Ch. 329. The principle applies to the case where the legacy is bequeathed on trust for the legatee and not directly to the legatee himself: *Re Harrison*, [1918] 2 Ch. 59.

(*q*) *Lassence v. Tierney*, 1 Mac. & G. 551, 561, 562, by Lord Cottenham, in his judgment, in which the previous authorities are examined. See also *Gompertz v. Gompertz*, 2 Phill. 107; *Bell v. Jackson*, 1 Sim. N. S. 547; *Cooper v. Mantell*, 22 Beav. 231; *Re Richards*, 50 L. T. 22; *Moryoseph v. M.*, [1920] 2 Ch. 33. And see in *Re Wilcock*, [1898] 1 Ch. 95, where a testator by his Will bequeathed his personal estate to his two daughters equally. By codicil he directed that "instead of such bequests in the manner expressed in my said Will to such daughters absolutely" his executors should stand possessed of his personal estate upon trust in moieties for his daughters for life and then to their children. There was no gift over in the event of a daughter dying without issue. One daughter died without issue having disposed of her moiety by her Will. It was held (following *Doe v. Marchant*, 6 Man. & G. 813) there was no intestacy as to the moiety given to the deceased daughter. See also *per* Lord Cairns in *Kellet v. Kellet*, L. R. 3 H. L. 160, where his lordship says, "The principle is perfectly clear that where you have a distinct disposition made by a Will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct."

A gift for maintenance and education has been held to determine with minority, as in *Badham v. Mee*, 1 Russ. & M. 631. See also *Gardner v. Barker*, 18 Jur. N. S. 508. But it seems from the case of *Soames v. Martin*, 10 Sim. 287, followed in *Wilkins v. Jodrell*, 13 O. D. 564, in preference to *Gardner v. Barker*, that there is no general rule that maintenance in such a gift will be limited to minority and not extended to life. See also *Knapp v. Noyes*, Amb. 661; *Re Booth*, [1894] 2 Ch. 232.

the second legacy shall be regarded as merely a *repetition* of the prior bequest; or whether it shall be construed as an additional bounty, and *cumulative* to the former benefit. On this point, the intention of the testator is the rule of construction (*r*).

The cases in which this question arises, may be classed under two heads: 1st, Where there is no evidence of the testator's intention apparent on the face of Will; 2nd, Where there is such internal evidence.

1st. Where there is no internal evidence of intention, the following propositions of law appear to be established:—

I. If the *same specific thing* is bequeathed *twice* to the same legatee in the same Will, or in the Will, and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once (*s*).

II. Where two legacies of quantity of *equal amount* are bequeathed to the same legatee in one and *the same instrument*, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only (*t*).

III. Where two legacies of quantity of *unequal amount* are given to the same person in the *same instrument*, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both (*u*).

IV. Lastly, where two legacies are given *simpliciter* to the same legatee by *different instruments*, in that case, also, the presumption is, that the latter is cumulative, whether its amount be equal (*v*) or unequal (*x*) to the former (*y*).

(*r*) *Ridges v. Morrison*, 1 Bro. O. C. 389; *Coote v. Boyd*, 2 Bro. O. C. 527; *Toller*, 334; *Lobley v. Stocks*, 19 Beav. 393.

(*s*) *Toller*, 335; *Suisse v. Lowther*, 2 Hare, 424, 432.

(*t*) Swinb. Pt. 7, s. 21, pl. 13; Godolph. Pt. 3, c. 26, s. 46; *Greenwood v. Greenwood*, 1 Bro. O. C. 30, *in notis*; *Garth v. Meyrick*, 1 Bro. O. C. 30; *Holford v. Wood*, 4 Ves. 75; *Manning v. Thesiger*, 3 M. & K. 29.

(*u*) Swinb. Pt. 7, s. 21, pl. 13; *Curry v. Pile*, 2 Bro. O. C. 225; *Windham v. Windham*, Finch, H. 267; *Yockney v. Hansard*, 3 Hare, 620, 622.

(*v*) Swinb. Pt. 7, s. 21, pl. 13; Godolph. Pt. 3, c. 26, s. 46; *Wallop v. Hewett*, 2 Chanc. Rep. 70; *Newport v. Kynaston*, Finch, R. 294; *Baillie v. Butterfield*, 1 Cox, 392; *James v. Semmens*, 2 H. Blackst. 219; *Benyon v. Benyon*, 17 Ves. 34; *Forbes v. Lawrence*, 1 Coll. 495; *Lee v. Pain*, 4 Hare, 210. But not, apparently, where the instruments are executed at the same time: *Whyte v. Whyte*, L. R. 17 Eq. 50.

(*x*) *Pitt v. Pidgeon*, 1 Chanc. Cas. 301; *Masters v. Masters*, 1 P. Wms. 423; *Hooley v. Hatton*, 2 Dick. 461; *Hodges v. Peacock*, 3 Ves. 735; *Wray v. Field*, 6 Madd. 300; *Mackenzie v. Mackenzie*, 2 Russ.

(*y*) See note (*y*) next page.

1st. Where there is no internal evidence of intention.

It may be observed here, that if the Court of Probate has granted probate, *as of a Will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper (*z*). So if two instruments have been admitted to probate in the Court of Probate as one testament, a Court of Construction is bound to consider them as such (*a*).

2ndly. Where there is internal evidence of intention.

2nd. Where there is internal evidence of the intention of the testator. In many cases, the Will or codicil affords intrinsic evidence that the second gift was intended by the testator as a mere substitution for the first; and consequently that one legacy alone was intended (*b*): For example, where a later codicil appears to be a mere copy of the former, with the addition of a single legacy (*c*), or when it is manifest that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former (*d*).

Chanc. Cas. 272, 273; *Watson v. Reed*, 5 Sim. 431; *Guy v. Sharp*, 1 M. & K. 589; *Gordon v. Hoffman*, 7 Sim. 29. In the last case, the testator, by his Will, gave to his son a legacy of three thousand pounds, and, by a codicil, a legacy of 4,000*l.* in addition to the legacy of two thousand pounds *given by his Will*: And Sir L. Shadwell, V.-C., held, that the son was entitled to the legacy of 3,000*l.* in addition to the legacy of 4,000*l.* See also accord., *Mann v. Fuller*, Kay, 624. See further, *Att.-Gen. v. George*, 8 Sim. 138; *Spire v. Smith*, 1 Beav. 419; *Robley v. Robley*, 2 Beav. 95; *Tweeddale v. Tweeddale*, 10 Sim. 453; *Hertford v. Lowther*, 7 Beav. 107; *Lyon v. Colville*, 1 Coll. 449.

(*y*) By Sir J. Leach, V.-C., in *Hurst v. Beach*, 5 Madd. 358; *Russell v. Dickson*, 4 H. L. O. 293; *Johnstone v. Lord Harrowby*, Johns. 425; 1 De G. F. & J. 183; *Cresswell v. Cresswell*, L. R. 6 Eq. 69; *Wilson v. O'Leary*, L. R. 7 Ch. 448. But the presumption may be rebutted if the Court can find in the context of the instruments an intention that the latter gift shall be substitutional: *Russell v. Dickson*, 2 Dr. & Warr. 133; 4 H. L. O. 293.

(*z*) *Baillie v. Butterfield*, 1 Cox, 392. See also *Campbell v. Radnor*, 1 Bro. O. O. 272, by Lord Loughborough; *Martin v. Drinkwater*, 2 Beav. 215; *Russell v. Dickson*, 2 Dr. & Warr. 133, 137; 4 H. L. O. 293.

(*a*) *Heming v. Clutterbuck*, 1 Bligh, N. S. 491, 492; *Brine v. Ferrier*, 7 Sim. 549. But see also *Walsh v. Gladstone*, 1 Phil. Ch. C. 294, *ante*, p. 446; and cf. *Hubbard v. Alexander*, 3 C. D. 738; *In the estate of Bryan*, [1907] P. 125.

(*b*) See *Martin v. Drinkwater*. 2 Beav. 215; *Yockney v. Hansard*, 3 Hare, 620; *Russell v. Dickson*, 2 Dr. & Warr. 133; 4 H. L. O. 293. Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy: *Hertford v. Lowther*, 7 Beav. 107. A codicil confirming a Will may revive a legacy that has been adeemed: *Re Aynsley*, [1915] 1 Ch. 172.

(*c*) *Coote v. Boyd*, 2 Bro. O. O. 521; *Moggridge v. Thackwell*, 1 Ves. 472; *Chichester v. Quatrefores*, [1895] P. 186, *ante*, p. 122.

(*d*) See upon this subject, *Mayor of London v. Russell*, Finch, R. 290; *Duke of St. Albans v. Beauclerk*, 2 Atk. 636; *Jackson v. Jack-*

So if in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both the instruments the *same* motive is expressed, and the *same* sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift (*e*). But the Court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments (*f*). It will not raise it if the same motive be expressed in both instruments, and the sums be different: Consequently, the legatee is in such case entitled to both sums (*g*).

On the other hand, the ordinary inference that legacies are cumulative, arising from the fact of their being of unequal amount, or of their being given by different instruments, may be strengthened by internal evidence: as, where one is given generally, and the other for an express purpose: or where one reason is assigned for the former, and another for the latter (*h*); or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money are given (*i*), or two annuities of the same amount by different instruments, the one payable quarterly, the other half-yearly (*k*); or where one legacy is vested and another contingent (*l*); or where one is

son, 2 Cox, 35; *Allen v. Callow*, 3 Ves. 289; *Barclay v. Wainwright*, 3 Ves. 462; *Osborne v. Duke of Leeds*, 5 Ves. 369; *Currie v. Pye*, 17 Ves. 462; *Att.-Gen. v. Harley*, 4 Madd. 263; *Gillespie v. Alexander*, 2 Sim. & Stu. 145; *Hemming v. Gurrey*, 1 Sim. & Stu. 311; *Fraser v. Byng*, 1 Russ. & M. 90; *Strong v. Ingram*, 6 Sim. 197; *Adnam v. Cole*, 6 Beav. 353; *Saurey v. Rumney*, 5 De G. & Sm. 698; *Tuckey v. Henderson*, 33 Beav. 174. If a testator expressly declares one gift to be in addition to another, and in another instance makes a gift without any such declaration, this is a *circumstance* to show that the latter was intended not to be additional, but in substitution: *Russell v. Dickson*, 2 Dr. & Warr. 139, *per* Sugden, O. of Ireland. See the remarks of Wigram, V.-C., on this point, in *Lee v. Pain*, 4 Hare, 219—221, 233.

(*e*) *Benyon v. Benyon*, 17 Ves. 34; *Hurst v. Beach*, 5 Madd. 358, by Sir John Leach, V.-C. Where a testatrix, by her Will, gave an annuity "to my servant E. H.," and, by a codicil, an annuity of the same amount "to my servant E. H.," the bequests were held to be cumulative, the word "servant" not expressing *the motive*, but being descriptive only: *Roch v. Callen*, 6 Hare, 531.

(*f*) *Mackinnon v. Peach*, 2 Keen, 555.

(*g*) *Hurst v. Beach*, 5 Madd. 359; *Lord v. Sutcliffe*, 2 Sim. 273.

(*h*) *Ridges v. Morrison*, 1 Bro. C. C. 388.

(*i*) *Masters v. Masters*, 1 P. Wms. 423, 424. See also *Att.-Gen. v. George*, 8 Sim. 138.

(*k*) *Currie v. Pye*, 17 Ves. 462.

(*l*) *Hodges v. Peacock*, 3 Ves. 735.

payable immediately on the testator's death and the other at a future period (*m*).

Parol evidence
of testator's
intention.

Before leaving this subject it is necessary to take some notice of the question as to the admissibility of parol evidence, to show that the testator did or did not intend a double benefit. In the case of *Hurst v. Beach* (*n*), Sir John Leach, V.-C., had occasion to consider the point: One of the questions before his Honour in that case was, whether parol evidence was admissible to prove that the testatrix meant a legacy of 500*l.*, given by a codicil, as a substitution merely for a legacy of 300*l.* given by her Will: Upon which his Honour gave the following judgment (*o*): "Upon the question whether evidence is admissible to prove that the testatrix did not mean that the defendants should take both sums, there are no decisions in Courts of Equity: There are *obiter dicta* for the admission of such testimony (*p*); but in *Osborne v. Duke of Leeds*, the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there to decide the question. It is to be collected from the Digest, that it was admitted by the civil law. This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a trust; and is bound to adopt, in questions of legacy, the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is that no decision has taken place there upon this question, and that no settled opinion is formed upon it (*q*):

(*m*) *Wray v. Field*, 2 Russ. Chanc. Cas. 261, 262. See also *Wright v. Cadogan*, 2 Eden, 239; *Guy v. Sharp*, 1 M. & K. 589; *Suisse v. Lowther*, 2 Hare, 424; *Lee v. Pain*, 4 Hare, 223.

(*n*) 5 Madd. 351.

(*o*) *Ibid.* 359.

(*p*) See *Coote v. Boyd*, 2 Bro. C. C. 528, by Lord Thurlow; and see also *Hooley v. Hatton*, 1 Bro. C. C. 390, note; *James v. Semmens*, 2 H. Black. 210.

(*q*) But although no decisions may be found as to the admissibility of evidence with respect to the *construction* of a Will and codicil giving legacies to the same legatee, yet there are several authorities for the admissibility, in the Ecclesiastical Court, of parol evidence, with respect to the *factum* of the instrument, to investigate *quo animo* the act was done by the testator; as whether a subsequent codicil was intended as a substitute for, and consequently, revocatory of a former one, or not; see *ante*, p. 122. See also the observations of Lord Loughborough in *Campbell v. Radnor*, 1 Bro. C. C. 272; and of Sir H. Jenner Fust, in *Thorne v. Rooke*, 2 Curt. 825—827; *Hubbard v. Alexander*, 3 C. D. 738, where evidence by one of the attesting witnesses to one of two duplicate codicils was admitted to show that they were not two distinct instruments.

It remains, then, to be considered upon the principles of evidence which are received in our own law. Our primary principle is, that evidence is not admissible to contradict a written instrument. *In some cases, Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repeal that presumption;* for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repeal the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him; and to repel the presumption that a portion is satisfied by a legacy. *In all these cases, the evidence is received in support of the apparent effect of the instrument, and not against it.* Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.*, but meant to substitute the 500*l.* in the place of the former 300*l.* I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument" (r).

In *Guy v. Sharp* (s), Lord Brougham decided, that evidence of a testator's *declarations* of his meaning and intention were inadmissible, upon the question whether a legacy was cumulative or substitutional: His Lordship, however, admitted depositions relating to the amount of the testator's property, and the circumstances of his family, to be read *de bene esse*. It became unnecessary to decide the point as to their admissibility, the learned judge being of opinion, that even if admitted, the evidence would not alter the conclusion to be arrived at upon

(r) See accord., *Hall v. Hill*, 1 Dr. & Warr. 94, 116; *Lee v. Pain*, 4 Hare, 216. See *post*, p. 1047. But see *Weall v. Rice*, 2 Russ. & M. 263; *Booker v. Allen*, *ibid.* 270.

(s) 1 M. & K. 589.

a due regard to the construction of the instruments themselves. But his Lordship adverted to the manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstances, by the knowledge of which, the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning (*t*).

Substituted or added legacies subject to the incidents of the original gift.

It may be here mentioned, as a general rule, that where one legacy is given as a mere *substitution* for another, the substituted gift is subject to the incidents of the original one, although it is not so expressed in the testamentary instrument (*u*). The rule is not confined to cases where the only change is one of amount but may apply to cases where the legatee under the substituted gift is a different person from the original legatee (*v*). So *added* legacies shall, generally speaking, be subject to the same conditions and incidents as those to which they are added (*x*). But this is not a universal rule (*y*), and it is only where the subject of the first gift is given absolutely, or made defeasible, that the second gift has been held to be given on similar terms: For the doctrine has never been extended so far as to alter an absolute second gift into an estate for life only, and then to the party who was

(*t*) See *Martin v. Drinkwater*, 2 Beav. 115. See also *Boys v. Williams*, *ante*, p. 924. Thus in *Wilson v. O'Leary*, L. R. 7 Ch. 448, evidence that the testator had in his possession an earlier codicil, at the time he made the later, was admitted so far as it went to prove the position of the testator, but was rejected so far as it suggested any motive for his making the second codicil. In this case also a letter written to the testator by his solicitor advising him to re-copy his first codicil was held inadmissible. And as to the admissibility generally of extrinsic evidence, see *Higgins v. Dawson*, [1902] A. C. 1, *per* Lord Davey.

(*u*) *Leacroft v. Maynard*, 1 Ves. 279; *Cooper v. Day*, 3 Meriv. 154; *Shaftesbury v. Marlborough*, 7 Sim. 237; *Day v. Croft*, 4 Beav. 561; *Bristow v. Bristow*, 5 Beav. 289; *Re Boden*, [1907] 1 Ch. 132, 149. See also *Johnstone v. Lord Harrowby*, 1 De G. F. & J. 183; *Re Corrie's Will*, 32 Beav. 426; *Fisher v. Brierley*, 30 Beav. 267. *Secus*, where the latter legacy is a distinct substantive bequest: *Chatteris v. Young*, 2 Russ. Chanc. Cas. 183; *Alexander v. Alexander*, 5 Beav. 518; *Haley v. Bannister*, 23 Beav. 336.

(*v*) *Re Backhouse*, [1916] 1 Ch. 65, distinguishing *Re Joseph*, [1908] 2 Ch. 507.

(*x*) *Cooper v. Day*, 6 Madd. 31; *Shaftesbury v. Marlborough*, 7 Sim. 137.

(*y*) *Overend v. Gurney*, 7 Sim. 128; *Re More's Trust*, 10 Hare, 171. And it cannot be applied unless it is consistent with the terms of the gift and the scope of the rest of the Will: *King v. Tootel*, 25 Beav. 23.

named in the first gift to take after that legatee's death (*z*). The rule has no application where the character of the gifts is entirely different (*a*).

So a provision in a Will that "no legacy given by this my Will" shall lapse applies to a bequest contained in a subsequent codicil (*b*).

SECTION VIII.

Satisfaction of Debts and Portions by Legacies.

It is a rule established in the Courts of Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, it will be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt (*c*). Of the satisfaction of debts by legacies.

The fact that the legacy was given generally without any reference to time of payment or to interest will not exclude the rule, nor will the fact that the legatee was appointed executor (*d*).

This rule, however, though it has long prevailed, has met with the censure of several eminent judges; and the Courts have inclined to lay hold of any minute circumstances whereupon to ground an exception to it (*e*).

(*z*) *Mann v. Fuller*, Kay, 624, where the second gift was held absolute, notwithstanding it was followed by the words "in addition to one thousand before mentioned," the first gift having been to the legatee for life with remainder to his children.

(*a*) *Re Howe*, [1910] W. N. 190.

(*b*) *Re Smith*, [1916] 2 Ch. 368.

(*c*) *Brown v. Dawson*, Prec. Chanc. 240; *Talbot v. Shrewsbury*, *ibid.* 394; *Fowler v. Fowler*, 3 P. Wms. 353; *Richardson v. Greese*, 3 Atk. 65; *Gaynon v. Wood*, 1 Dick. 331; *Hammond v. Smith*, 33 Beav. 452; *Atkinson v. Littlewood*, L. R. 18 Eq. 595; *Re Fletcher*, 38 C. D. 373; *Re Rattenberry*, [1906] 1 Ch. 667, 670. So a legacy may operate as a satisfaction of a covenant: *Wathen v. Smith*, 4 Madd. 325; *Re Hall, Hope v. H.*, [1918] 1 Ch. 562. But see *Cole v. Willard*, 25 Beav. 568; *Charlton v. West*, 30 Beav. 124. But where the legacy is of less amount than the debt, it shall not be deemed a part payment or satisfaction: *Cranmer's Case*, 2 Salk. 508; *Graham v. Graham*, 1 Ves. Sen. 263; *Thynne v. Glengall*, 2 H. L. C. 153, 154.

(*d*) *Re Rattenberry*, [1906] 1 Ch. 667.

(*e*) See the remarks of Sir T. Clarke, M. R., in *Mathews v. Mathews*, 2 Ves. Sen. 636, and of Lord Alvanley in *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529, and of Lord Cottenham in *Thynne v. Glengall*, 2 H. L. C. 153; *Re Horlock*, [1895] 1 Ch. 516, 518. See also *Hales v. Darrell*, 3 Beav. 324, 332; *Smith v. Lyne*, 2 Y. & Coll. Ch. C. 345; *Hassell v. Dawkins*, 4 Drew. 468.

Presumption
of satisfaction
rebuttable.

Thus the presumption of satisfaction shall not be made, where the debt was not contracted till after the making of the Will: for the testator could not have intended by the legacy to have satisfied a debt which did not then exist (*f*): Nor where the debt is due upon a current account; for the state of the account, and on whose side the balance lay, might be unknown to the testator (*g*): Nor where the debt was upon a bill of exchange, or other negotiable security; for the debt might have been transferred to a stranger by the legatee passing away, the instrument (*h*).

Where legacy
contingent or
uncertain:

Again, where a legacy is at all contingent or uncertain, it shall not be deemed a satisfaction of a debt (*i*). As where the legacy is given upon the contingency of the legatee surviving a particular person or period (*j*); or where the legacy is of the whole or part of a residue; for it may possibly turn out, after all the claims on the testator's estate are satisfied, that such legacy is not of equal amount with the debt (*k*). So a provision by Will that the legatee shall have the interest of a particular fund, or other proceeds, *for life*, shall not be deemed a satisfaction of a sum of money which the legatee is entitled to claim *absolutely* from the testator (*l*).

where legacy
not payable
immediately
on death of
testator:

Another exception to the rule exists in cases where the legacy is not payable immediately after the death of the testator: for the debt is due at the death of the testator, and therefore the legacy must be so too (*m*). Thus, in *Mathews v. Mathews* (*n*), Sir Thomas Clarke, M. R., said, that he remembered a case before the Lord Chancellor (Lord Hardwicke) where an old lady, indebted to a servant for wages, by Will gave ten times as much as she owed, or was likely to owe: yet because the legacy was made payable in a month after her own death, the

(*f*) *Cranmer's Case*, 2 Salk. 508; *Jefferies v. Wood*, 2 P. Wms. 132; *Thomas v. Bennet*, 2 P. Wms. 343.

(*g*) *Rawlins v. Powell*, 1 P. Wms. 299.

(*h*) *Carr v. Eastbrooke*, 3 Ves. 561.

(*i*) *Nicholls v. Judson*, 2 Atk. 300.

(*j*) *Compton v. Sale*, 2 P. Wms. 553.

(*k*) *Devese v. Pontet*, 1 Cox, 188; *Thynne v. Glengall*, 2 H. L. C. 154.

(*l*) *Alleyn v. Alleyn*, 2 Ves. Sen. 37; *Forsight v. Grant*, 1 Ves. 298; and see *Re Hall*, [1918] 1 Ch. 562.

(*m*) By Lord Hardwicke, in *Clark v. Sewell*, 3 Atk. 96. See also *Atkinson v. Webb*, Prec. Chanc. 236; *Nicholls v. Judson*, 2 Atk. 300; *Mathews v. Mathews*, 2 Ves. Sen. 635; *Haynes v. Mico*, 1 Bro. C. C. 129; *Jeacock v. Falkener*, 1 Bro. C. C. 295; *Adams v. Lavender*, 1 M'Clel. & Y. 41.

(*n*) 2 Ves. Sen. 636.

Court laid hold of that circumstance to take it out of the general rule (*o*).

A further exception may be found in cases where the legacy and debt are of a different nature (*p*); as where the testator is indebted by bond, and bequeaths an interest in land to his creditor (*q*). So in *Bartlett v. Gillard* (*r*), a leasehold estate of the testator's was subject to an annuity of 12*l.* to Mrs. Bartlett for her sole use, to be paid to her half-yearly, on the 27th of January and the 27th of July: He devised all his lands, in which the leasehold was included, to Richard Gillard, paying to Mrs. Bartlett 12*l.* per annum, by half-yearly payments, to be made on the 27th of January and the 27th of July: The Lord Chancellor held, that although the amounts of the two annuities and the days of payment were precisely the same, yet as the second was charged upon the freehold as well as the leasehold property, and was payable to Mrs. Bartlett generally and not to her separate use, this was sufficient to repel the presumption that the second annuity was intended as a satisfaction of the first, and that consequently both were payable. In *Fourdrin v. Gowdey* (*s*), a testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to Anna Jewitt, and another of 100*l.* to Mary Ann Myers, who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime, or to direct them to be paid by his executors: He did not pay them in his lifetime; but, amongst other legacies, which by his Will he directed his executors to pay, was a sum of 500*l.* to Anna

where legacy
and debt are
of different
nature.

(*o*) In *Richardson v. Greese*, 3 Atk. 69, Lord Hardwicke said, that legacies to servants had never been held to be in satisfaction of debts. But this case mentioned by Sir T. Clarke, and also *Chancey's Case*, 1 P. Wms. 408, seem to decide that they are to be so considered, unless there are circumstances to take the case out of the general rule.

(*p*) See the observations of Lord Hardwicke in *Bellasis v. Uthwatt*, 1 Atk. 428.

(*q*) *Eastwood v. Vinke*, 2 P. Wms. 614; *Richardson v. Elphinstone*, 2 Ves. 463.

(*r*) 3 Russ. Chanc. Cas. 149.

(*s*) 3 M. & K. 409. And in *Fairer v. Park*, 3 O. D. 309, Vice-Chancellor Hall in his judgment says: "This case seems to me to be within the principle stated by the M. R. in *Fourdrin v. Gowdey*, where he says it is 'a question not of satisfaction but performance,' and also within the case of *Rowe v. Rowe* (2 De G. & Sm. 294, 298), in which Sir J. Knight Bruce referred to Lord Lyndhurst's observation in *Bartlett v. Gillard*, *ubi supra*, that the circumstance of the gift of one annuity being for separate use, and another not, is a material fact."

Jewitt, and a sum of 100*l.* to Mary Ann Myers, not limited to her separate use: Sir J. Leach, M. R., held that the sum of 100*l.* given to Anna Jewitt by the appointment of the wife was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to Mary Ann Myers was in addition to, and not a satisfaction of, the 100*l.* given to her separate use by the wife.

Legacy of specific chattel not generally a satisfaction of debt.

Again, a legacy of a specific chattel, however great its value, will not be a satisfaction of a debt; unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction (*t*).

It must also be observed, that the presumption of satisfaction may be counteracted by other parts of the Will: As where the legacy appears to be given *diverso intuitu*, some particular purpose being expressed as the ground of the bequest (*u*): or where there is an express direction in the Will for the payment of *all debts and legacies* (*v*).

A legacy given by a parent to a child is regarded, with respect to the rule in question, in the same light as a legacy to a stranger (*x*): Nor is a legacy given by a husband to his wife considered upon any different footing (*y*).

It is said that a legacy shall in all cases be construed as a satisfaction, in case there be a deficiency of assets (*z*).

Of the satisfaction of portions by legacies.

With respect to the satisfaction of portions by legacies, the rule has been established, with much fewer exceptions than that

(*t*) *Byde v. Byde*, 1 Oox, 49.

(*u*) *Mathews v. Mathews*, 2 Ves. Sen. 635; *post*, p. 1046, note (*i*).

(*v*) *Chancey's Case*, 1 P. Wms. 410, 411; *Richardson v. Greese*, 3 Atk. 68; *Field v. Mostin*, 2 Dick. 543; *Hales v. Darell*, 3 Beav. 324; *Lethbridge v. Thurlow*, 15 Beav. 334; *Jeffries v. Mitchell*, 20 Beav. 15; *Wathen v. Smith*, 4 Madd. 331; *Charlton v. West*, 30 Beav. 124; *Edmunds v. Low*, 3 Kay & J. 318, in which last case Wood, V.-C., held that a direction to pay *debts* (without more) is insufficient to rebut the presumption. See, however, *contra*, *Cole v. Willard*, 25 Beav. 568; *Glover v. Hartcup*, 34 Beav. 74; and compare *Atkinson v. Littlewood*, L. R. 18 Eq. 595. In the case of *Re Huish*, 43 C. D. 260, the decision in *Edmunds v. Low*, *ubi supra*, was disapproved by Kay, J., who held that a direction by a testator that his "debts" are to be paid is sufficient, without the further direction to pay "legacies," to exclude the presumption that a legacy to a creditor, equal to, or exceeding the debt, is a satisfaction of the debt. A liability on a covenant made on marriage is a debt within the meaning of a direction "to pay debts:" *Cole v. Willard*, 25 Beav. 572, 573, dissenting from Sir J. Leach's opinion in *Wathen v. Smith*, *ubi supra*.

(*x*) *Tolson v. Collins*, 4 Ves. 483; *post*, p. 1046.

(*y*) *Fowler v. Fowler*, 3 P. Wms. 353; *Re Fletcher*, 33 C. D. 373.

(*z*) Toller, 337.

with regard to the satisfaction of debts, that where a parent is under obligation, by articles or settlement, to provide portions for his children, and he afterwards makes a provision by Will for them, such testamentary provision shall, *primâ facie*, be presumed to be a satisfaction or performance of the obligation (*a*). The strong inclination of the Courts against double portions has caused this rule to be applied without much relaxation (*b*).

If, therefore, the bequests be less in amount than the portions, or payable at different periods, such legacies will, notwithstanding, be considered satisfactions, either in full or in part according to circumstances (*c*). So though a gift of a whole or part of a residue cannot be considered as a satisfaction of a debt (*d*), yet it may be a satisfaction of a portion altogether, or *pro tanto* according to the amount (*e*).

A provision by Will may satisfy one part of a covenant to settle without satisfying the other parts of it, for instance, if a father on the marriage of his daughter should settle 1,000*l.* on her for life with remainder to her children, a bequest of 1,000*l.* to the daughter would satisfy her life interest but would not satisfy the interests of her children (*f*). Cases of satisfaction of portions ought not to be further extended, and therefore the doctrine does not apply where the covenantee takes no direct interest under the Will, but only a derivative interest by reason of some disposition by the legatee (*g*). The fact that the Will directs certain sums advanced to the legatee before the date of the Will to be brought into hotchpot does not rebut the presumption that a legacy to the legatee is a satisfaction of her interest under the settlement (*h*).

(*a*) *Bruen v. Bruen*, 2 Vern. 439; *Copley v. Copley*, 1 P. Wms. 147; *Moulson v. Moulson*, 1 Bro. C. C. 82; *Ackworth v. Ackworth*, 1 Bro. C. C. 307, note; *Weall v. Rice*, 2 Russ. & M. 251; *Papillon v. Papillon*, 11 Sim. 642; *Thynne v. Glengall*, 2 H. L. O. 131; *Bennett v. Houldsworth*, 6 C. D. 671; *Montagu v. Earl of Sandwich*, 32 C. D. 525.

(*b*) See also *infra*, Pt. III. Bk. III. Ch. III. § II., as to the ademption of legacies given as portions.

(*c*) *Jesson v. Jesson*, 2 Vern. 255; *Byde v. Byde*, 1 Cox, 44; *Warren v. Warren*, 1 Bro. C. C. 305; *Finch v. Finch*, 1 Ves. 534; *Thynne v. Glengall*, 2 H. L. O. 153, 154. See *Fazakerley v. Gillibrand*, 6 Sim. 591.

(*d*) *Ante*, p. 1042.

(*e*) *Thynne v. Glengall*, 2 H. L. C. 131, 154; *Dawson v. Dawson*, L. R. 4 Eq. 504; *Nevin v. Drysdale*, L. R. 4 Eq. 517.

(*f*) *Re Blundell*, [1906] 2 Ch. 222.

(*g*) *Ibid.*

(*h*) *Ibid.*

Presumption
of satisfaction
repelled or
fortified by
intrinsic
evidence.

But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences (*i*), the two instruments afford intrinsic evidence against a double provision: Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision (*j*).

It must be further observed, that a legacy by a father to a child is not a satisfaction of a *debt* due to the child, or of moneys owing to the child *in the nature of a debt*, in any other

(*i*) *Per* Turner, L. J., in *Coventry v. Chichester*, 2 Hemm. & M. 149; *Chichester v. Coventry*, L. R. 2 H. L. 71; *Campbell v. Campbell*, L. R. 1 Eq. 383; *Russell v. St. Aubyn*, 2 O. D. 398. It is not possible to define what are to be considered as slight differences between two provisions: Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself: by Sir J. Leach, M. R., in *Weall v. Rice*, 2 Russ. & M. 268; *McCarogher v. Whieldon*, L. R. 3 Eq. 236. Where the legacy is contingent, it shall not be considered a satisfaction of the portion: *Bellasis v. Uthwatt*, 1 Atk. 426, 428; *Hanbury v. Hanbury*, 2 Bro. C. C. 352. So where the legacy is given *diverso intuitu*: see *Foster v. Evans*, 6 Sim. 15; *Glover v. Hartcup*, 34 Beav. 74.

(*j*) *Chichester v. Coventry*, L. R. 2 H. L. 71; *Weall v. Rice*, 2 Russ. & M. 267; *Paget v. Grenfell*, L. R. 6 Eq. 7; *Re Tussaud's Estate*, 9 O. D. 363; *Montagu v. Earl of Sandwich*, 32 C. D. 525; *Re Vernon*, 95 L. T. 48. The question whether a gift in a Will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a Will, is one of intention. The rule that there is a presumption against double portions is founded on the assumption that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the Will precedes the settlement than where the settlement precedes the Will. In the latter case, the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the Will was not meant in satisfaction of the covenant. Where, too, the gift by the Will is not to the child, but to trustees to pay debts and legacies, and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared: *Chichester v. Coventry*, L. R. 2 H. L. 71. There is a marked distinction between "ademption" and "satisfaction." In the former, the benefit is given by a revocable instrument, and in any future gift the giver may declare his pleasure as to the second gift being taken in substitution for the first. In the case of a gift by settlement, followed by a Will, the persons to be benefited have the right to elect which of the gifts they will take, a right which does not arise in the other case: *ibid.* per Lord Romilly. See also *Bennett v. Houldsworth*, 6 C. D. 671; and cf. *Cartwright v. Cartwright*, [1903] 2 Ch. 306, where a covenant in a marriage settlement to pay 2,000*l.* to the trustees of the settlement was held not satisfied by policies for that sum effected by the covenantor under sect. 10 of the Married Women's Property Act, 1870.

way than a debt due to a stranger would be satisfied by a legacy (*k*): and therefore circumstances of difference, such as there has already been occasion to point out (*l*), will be laid hold of by the Court to prevent the application of the rule of satisfaction (*m*). And in *Hall v. Hill* (*n*), where a father upon the marriage of his daughter executed to the intended husband his bond (with a warrant of attorney for confessing judgment thereon), conditioned for the payment of 800*l.* by instalments, part thereof to be paid during his life, and the residue upon his decease, and the intended husband gave a bond in the same amount to the trustees of the marriage settlement, which was settled upon the intended wife and issue; and then the father bequeathed to his daughter a legacy of 800*l.*; it was held by Sugden, C. of Ireland, that this legacy could not be considered as a satisfaction of the debt due to the husband, notwithstanding such debt was, in substance, a portion.

With respect to rebutting the presumption of satisfaction of a debt by parol evidence, it was holden by Lord Talbot, in *Fowler v. Fowler* (*o*), that such evidence was not admissible: But Lord Eldon, in *Wallace v. Pomfret* (*p*), upon the authority of the cases as to satisfaction of portions (*q*), held, that parol declarations by the testator are admissible in evidence, to repel the presumption of a satisfaction of a debt by a bequest of a greater amount, even where such declarations were not contemporaneous with, but subsequent to the making of the Will; *and although the expressions in the Will may afford an inference in favour of the presumption*. And it was laid down by Sir J. Leach, in *Weall v. Rice* (*r*), that *whether the two instruments afford intrinsic evidence in favour of or against a double provision*, extrinsic evidence is admissible of the real intention of the testator. And this proposition seems to have been approved of by Lord Langdale in *Lord Glengall v. Barnard* (*s*). And it is now settled that where a presumption has arisen to imply

(*k*) *Ante*, p. 1045.

(*l*) *Ante*, p. 1042 *et seq.*

(*m*) *Tolson v. Collins*, 4 Ves. 483; *Stocken v. Stocken*, 4 Sim. 152. See *Plume v. Plume*, 7 Ves. 258.

(*n*) 1 Dr. & Warr. 94.

(*o*) 3 P. Wms. 354.

(*p*) 11 Ves. 547, 548. But this case was disapproved by Lord St. Leonards in *Hull v. Hill*. 1 Dr. & Warr. 94, 112. Compare *Ferris v. Goodburn*, 27 L. J. Ch. 574, 576.

(*q*) See *post.* p. 1073 *et seq.*

(*r*) 2 Russ. & M. 267, 268.

(*s*) 1 Keen, 769, 793, 794.

Admissibility
of parol
evidence.

an intention in the Will, the rule is that parol evidence is admissible to rebut such presumption, and there is no difference in this respect between a deed and a Will (*t*).

SECTION IX.

Release of Debts by Legacies: the effect of appointing a Debtor or a Creditor to be Executor, and the Retainer or Set-off of Legacies.

1. Of a Legacy by a Creditor to his Debtor.

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found uncanceled among the testator's property, the Courts of Equity do not consider the legacy to the debtor as necessarily, or even *primâ facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release (*u*): And if such intention does not appear clearly expressed or implied on the face of the Will, evidence from other sources will be admitted (*x*). *Primâ facie* a bequest to a debtor of the debts due from him means the debts due from him severally, and does not include debts due from a firm of which he is a member (*y*).

(*t*) *Re Tussaud's Estate*, 9 O. D. 363. "You look at the Will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention to give a double portion. That is entirely independent of the construction of the Will. When you come to a presumption to imply an intention in the Will, then the rule always is that you may admit parol evidence to rebut such presumption. I know no distinction in this respect between a deed and a Will. The whole fallacy lies in supposing that it is for the purpose of determining the construction of the instrument. You first construe the Will, and if in any way a presumption arises, you admit evidence to rebut that presumption": by Cotton, L. J., at p. 374.

(*u*) *Wilmot v. Woodhouse*, 4 Bro. C. C. 226; *Jefferies v. Wood*, 2 P. Wms. 132. See also *Hyde v. Neate*, 15 Sim. 554, for an example of a Will where the language is sufficient to show that the testator intended to remit the debts of the legatees, as well as to give them their legacies. A mere direction to bring debts into hotchpot is not *per se* sufficient: *Re Barker*, [1918] 1 Ch. 128.

(*x*) *Eden v. Smyth*, 5 Ves. 341. It is dangerous to extend the doctrine of this case: *Chester v. Urwick*, 23 Beav. 404.

(*y*) *Ex parte Kirk*, *Re Bennett*, 5 C. D. 800.

Where a testator recites that a legatee is indebted in a certain sum, that recital binds the legatee, except in case of a clear mistake of figures (z).

It must be observed, that if the testator expressly bequeaths the debt to his debtor, this, being no more than a release by Will, operates only as a legacy; and the debt is assets, therefore, subject to the payment of the testator's debts (a). So where advances were to be taken in full or part satisfaction of a legacy, the words amounted to a gift or release of the debt and involved a legacy of the difference in case the debt exceeded the benefit (b).

Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off (c); and a share of a trust fund can be retained against a liability to the fund of the party entitled to it, though he is entitled to it by way of derivative title

Retainer and set-off of a legacy, in respect of a debt due from the legatee, or party claiming through the legatee :

(z) *Robinson v. Bransby*, 6 Madd. 348; *Re Kelsey*, [1905] 2 Ch. 465. See also *Re Aird's Estate*, 12 O. D. 291. This case is stated in the head note to *Re Taylor's Estate*, 22 O. D. 495, not to have been followed, but it seems from the judgment of the Court of Appeal that *Re Taylor's Estate* turned on a question of construction unaffected by *Re Aird's Estate*. See *Re Wood*, 32 O. D. 517, *per* North, J.

(a) *Rider v. Wager*, 2 P. Wms. 331, 332; *ante*, pp. 924, 925.

(b) *Re Trollope*, [1915] 1 Ch. 853.

(c) *Jeffs v. Wood*, 2 P. Wms. 130; *Smith v. Smith*, 3 Giff. 263; *Re Savage*, [1918] 2 Ch. 146. And this principle applies even in the case of a specific legatee, if the legacy be represented by moneys in the hands of the executors: *Re Taylor*, [1894] 1 Ch. 671, *post*, p. 1053. It would seem, however, that this is a rule of administration, and it is not the application of the ordinary rule of set-off. It may be therefore that this rule might be applicable as between joint and several debts, and in fact this seems to have been decided in *Smith v. Smith*, *ubi supra*. This case (explained in *Turner v. Turner*, *infra*) is cited in Lindley on Partnership, 8th ed. 238, in support of the following statement: "It has long been held that a creditor of a firm is entitled to obtain payment from the estate of a deceased partner, even although the creditor may have taken as a security for his debt a bond or covenant binding the partners jointly"; and at p. 725, for the further statement: "A legatee is not entitled to receive, out of the estate of his testator, any part of the bounty intended for him by the testator, until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate." But this does not apply where the debt is due not from the legatee but only from a partnership of which he is a member: *Turner v. Turner*, [1911] 1 Ch. 716; and see *Jackson v. Yeats*, [1912] 1 Ir. R. 267, where the debt was due to a firm in which the testator was a partner. So a retainer will be allowed to one executor, out of a legacy to his co-executor, in respect of a *devastavit* by the latter: *Sims v. Doughty*, 5 Ves. 243.

only (d). And it has been held, that in a suit by a legatee to obtain payment of the legacy *out of the assets of the testator*, in a due course of administration, the executor may retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations (e).

It may be observed, that the term "set-off" is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right to set-off. And such right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt (f). Accordingly, in *Cherry v. Boulton* (g),

(d) *Doering v. Doering*, 42 O. D. 203; *Re Dacre*, [1916] 1 Ch. 344.

(e) *Courtenay v. Williams*, 3 Hare, 539; *Rose v. Gould*, 15 Beav. 189; *Coates v. Coates*, 33 Beav. 249; *Campbell v. Graham*, 1 Russ. & M. 453. See the remark of Knight Bruce, V.-C., in *Harvey v. Palmer*, 4 De G. & Sm. 427. So one of the next of kin of an intestate cannot share in the intestate's estate until he has paid the whole of a debt owing from him to the estate, notwithstanding that part of such debt is statute-barred: *Re Cordwell's Estate*, L. R. 20 Eq. 644. But the right of an executor to retain or set off the share of one of the next of kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by the Statute of Limitations, depends upon whether there was due from the legatee a debt for which but for the Statute of Limitations he could have been sued: *Re Wheeler*, [1904] 2 Ch. 66. Legatees who were also next of kin of the testator brought an action against the executor seeking a revocation of the probate, but failed, and were ordered to pay the executor's costs of the action. While the action was pending some of the plaintiffs assigned and others mortgaged their shares whether under the Will or on an intestacy. Afterwards the legatees commenced an action against the executor in the Chancery Division for the administration of the estate. It was held that the executor was entitled to set-off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances: *Re Knapman*, 18 C. D. 300; cf. *Re Harvald*, 53 L. J. Ch. 505. But although where a trustee-beneficiary assigns his share the assignees are liable for any subsequent default by him as trustee, where a beneficiary assigns his share and notice of the assignment is duly given to the trustees, a debt to the estate subsequently incurred does not take priority over the assignment: *Re Pain*, [1919] 1 Ch. 38.

(f) *Cherry v. Boulton*, 4 M. & Cr. 442, 447, per Lord Cottenham; and see *Re Briant*, 39 C. D. 471, 479; *Re Akerman*, [1891] 3 Ch. 212, 219; *Re Taylor*, [1894] 1 Ch. 671; *Re Watson*, [1896] 1 Ch. 925. But this rule is much wider of application than the doctrine of set-off. The rule is of general application that where a fund is being distributed

(g) 2 Keen, 319; affirmed on appeal, 4 M. & Cr. 442.

Thomas Boulton was indebted to Catherine Boulton, his sister, in the sum of 1,878*l.*: He became bankrupt, and shortly after his bankruptcy, Catherine made her Will, whereby she gave legacies of 500*l.* and 2,000*l.* to her executors, in trust to pay the interest thereof (as to the 500*l.* after the decease of her mother) to Thomas Boulton for his life, without power of anticipation, and free from his debts; and after his decease to pay the principal to such persons as he should appoint, and in default of appointment to his executors and administrators, for his and their own use and benefit: The testatrix did not prove her debt under her brother's commission: He died without having obtained his certificate, and without having attempted to make any appointment: Lord Langdale, M. R., held, that the executors of the testatrix had no right to set-off the debt due from Thomas Boulton to the testatrix against the legacies, but that the assignee of Thomas Boulton was entitled to so much of the legacies as the assets were sufficient to pay: And this decision was confirmed by Lord Cottenham on appeal: And his Lordship observed, that the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignees more than the dividends of the debt; and as the bankrupt never obtained his certificate, he was never entitled to receive the legacy: consequently there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; and therefore the right of retaining a sufficient sum out of the legacy to pay the debt could never have vested in any one; though the assignees would have been bound to allow the amount

a party cannot take anything out of the fund until he has made good what he owes to the fund: *Re Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Jewell*, [1919] 2 Ch. 161. There must, however, be an existing legal liability as debtor: *Re Bruce*, [1908] 1 Ch. 850; *Re Sewell*, [1909] 1 Ch. 806. The rule does not apply where the debt is due from a firm of which the legatee is a member: *Turner v. Turner*, [1911] 1 Ch. 716; nor to a debt repayable by future instalments: *Re Abrahams*, [1908] 2 Ch. 69. A share of surplus assets in a winding-up due to the estate of an insolvent testator indebted to the company can only be retained against his executors to the extent of the dividend on his debt declared before the winding-up: *Re Peruvian Railway Construction Co.*, [1915] 2 Ch. 442, and *Re Pink*, [1912] 1 Ch. 498, 505. The rule also does not apply where a trustee takes a specific legacy and is in default in respect of residue: *Re Towndrow*, [1911] 1 Ch. 662. As to the case of a legatee who is a debtor to the testator and after his death goes bankrupt, see *Re Melton*, [1918] 1 Ch. 37. As to retaining a legacy against a debt arising from breach of trust, see *Re Harris*, [1914] 2 Ch. 395, *ante*, p. 804.

of any dividend on the debt, if it had been proved (*h*).—It will be seen that in this case the claim for the legacy arose *after the bankruptcy*, at a time when the claim of the testatrix, in respect of the debt due from the bankrupt, was merely a right of proof against his estate in the hands of the assignee: And the decision, therefore, does not apply to a case where the right to receive and the liability to pay both existed at the time of the bankruptcy (*i*). Where, in truth, the cross demands are essentially in different rights, it is a general rule, of equity as well as law, that one of such demands cannot be applied in satisfaction of the other (unless the right to do so be conferred by agreement, express or implied, which the Court has thought itself justified in presuming from slight circumstances (*k*)): Accordingly, in *Freeman v. Lomas* (*l*), where an executor and trustee of a legacy, who was also residuary legatee, had become a creditor of the husband and administrator of the deceased legatee in respect of debts incurred since he had become her administrator: it was held by Turner, V.-C., that as there were no circumstances from which an agreement to set-off the one demand against the other could be presumed, the debt could not be set-off against the legacy (though assets were admitted): because the claims existed in different rights.

Generally, it may be stated that the result of the authorities appears to be, that before the Married Women's Property Act, 1882, where a debt to the estate of a testator might be set-off by the executors against a legacy bequeathed by the testator to his debtor, such debt might also be set-off against a legacy

(*h*) *Cherry v. Boulton*, 4 M. & Cr. 442, 448. *Cherry v. Boulton* was followed by Hall, V.-C., in *Re Hodgson*, 9 C. D. 673, and *Re Orpen*, 16 C. D. 202. *Cherry v. Boulton* and the cases in which it has been followed do not proceed upon the footing that the liability of the legatee to pay the debt came to an end on his bankruptcy, and that it was the extinguishment of his liability which entitled him to payment of the legacy in full. The true ground of those decisions is that the legacy vested in the legatee as agent for his assignee in bankruptcy, and that as against his principal those accountable for the legacy could only retain thereout the payments for which the principal was liable, that is, the dividends distributable in the bankruptcy: *Re Pink*, [1912] 1 Ch. 498, 505, *per* Eve, J.; and see *Re Peruvian Railway Co.*, [1915] 2 Ch. 442. Cf. *Re Watson*, [1896] 1 Ch. 925, where the legatee became bankrupt *after* the testator's death; and see *Re Melton*, [1918] 1 Ch. 37.

(*i*) *Lee v. Egremont*, 5 De G. & Sm. 348, 368. See *Bousfield v. Lawford*, 1 De G. J. & S. 459; *Re Watson*, [1896] 1 Ch. 925.

(*k*) *Freeman v. Lomas*, 9 Hare, 109, 114.

(*l*) 9 Hare, 109.

in case of a
legacy to a
feme covert :

bequeathed by the testator to the wife of the debtor, subject to her equity (if any) to a settlement out of the legacy (*m*).

In *Harvey v. Palmer* (*n*), leaseholds had been bequeathed for the legatee's personal support and maintenance, and to be entirely free from any claim, charge or demand of his creditors: And Knight-Bruce, V.-C., held that the leaseholds could not be withheld from the legatee until he paid a debt due from him to the testator; for that the testator had expressed that which was equivalent to a declaration of intention that they should not be so withheld: And his Honour seemed to doubt whether, in any case, where a *specific* legatee is indebted to the testator, the legacy can be withheld till the debt is paid (*o*). But this doubt has now been resolved by the decision in *Re Taylor* (*p*), where Chitty, J., states the law to be that a specific legacy is no less liable to be set-off than a general legacy, if the legacy be represented by moneys in the hands of the executors, but not if it be a legacy of chattels real or of a specific chattel, in which cases the legacy and the debt cannot be measured one against the other. There must be money payable against money payable, and the fact that the gift is something like money or something easily turned into money is not enough, and therefore there is no right of retainer out of a specific bequest of stock (*q*).

in case of a
specific
legacy.

2. *The effect of appointing a Debtor to be Executor.*

It will be convenient to consider this subject, first, as to the effect at common law, of the testator's appointing his debtor to be his executor; and then as to the effect in equity.

At common
law.

Inasmuch as the rules of equity, where before the Judicature Acts there was any conflict between them and the rules of common law, prevail (*r*), the effect at common law of the appointment by a testator of his debtor to be his executor does not require to be stated at length. Generally it may be stated that an appointment by the testator of his debtor, whether he

(*m*) *McMahon v. Burchell*, 5 Hare, 325; *M'Cormick v. Garnett*, 2 Sm. & G. 37; *Elibank v. Montolieu*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574; *Ranking v. Barnard*, 5 Madd. 32; *Re Briant*, 39 C. D. 471.

(*n*) 4 De G. & Sm. 425.

(*o*) See *ante*, p. 1050, note (*e*).

(*p*) [1894] 1 Ch. 671, *ante*, p. 1049, note (*c*).

(*q*) *Re Savage*, [1918] 2 Ch. 146.

(*r*) Judic. Act, 1873, s. 25, sub-s. 11. See *per* Lord Cairns in *Pugh v. Heath*, 7 App. Cas. 237.

was a sole debtor or one of several joint debtors, or even one of joint and several debtors, his executor, operated as a release or extinguishment of the debt: The principle being that a debt is merely a right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action for the debt: And where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged. Thus if the obligee of a bond makes the obligor his executor, this amounts at law to a release of the debt (s).

Nor is the case varied by the executor dying without having either proved the Will or administered (t), for in such a case also the debt is extinguished and the administrator *cum testamento annexo* can bring no action for it. There seems to be some doubt whether the debt of a sole executor who does not administer and refuses probate was at common law released (u): but the debt of one of several executors who refused was released if the others administered (v), for he must have been made a co-plaintiff in all actions by the other executors. Since the passing of 20 & 21 Vict. c. 77, s. 79, which enacts that the rights of an executor renouncing probate are to cease as if he had not been named an executor in the Will, it would seem as if the debt of a renouncing executor is not released. The mere fact of an executor not proving does not seem to prevent the debt being released. At all events an opportunity would be given him to come in and prove (x).

It must, however, be observed, that, as between the debtor executor and the creditors of the testator, this doctrine was applicable only in cases where there were assets sufficient to satisfy the testator's debts (y): For it would be unfair to defraud the creditors of their just debts by a release which is absolutely voluntary (z); And therefore the debt due from the

(s) *Needham's Case*, 8 Co. 136, a.

(t) *Wankford v. Wankford*, 1 Salk. 299; Wentw. Off. Ex. c. 2 (14th edit.); Com. Dig. Admon. (B. 5).

(u) *Wankford v. Wankford*, 1 Salk. 307. See *contra*, *Abram v. Cunningham*, 2 Ventr. 303; and Butler's notes to Co. Lit. 264, b.

(v) 1 Salk. 308; Bac. Abr. tit. Exors. (A.) 10; note to *Cabell v. Vaughan*, 1 Saund. 291.

(x) *Re Applebee*, [1891] 3 Ch. 422.

(y) Bac. Abr. Exors. (A.) 10.

(z) 2 Black. Com. 512: If the testator, says Lord Talbot, in *Brown v. Selwyn*, Cas. temp. Talb. 241, 242, had expressly given it away, even that could not have screened it from debts.

executor was considered, on their behalf, as assets in his hands (*a*): Accordingly it was said by Lord Holt (*b*), that when the obligee makes the obligor his executor, the debt is assets, and the making him executor does not amount to a legacy, but to payment and release: And that if H. be bound to J. S. in a bond of 100*l.*, and then J. S. makes H. his executor, H. has actually received so much money, and is answerable for it; and if he does not administer so much, it is a *devastavit*.

It must further be remarked, that, where the debtor is appointed executor, the suspension of the remedy is the *voluntary act of the creditor*, and therefore the action was for ever gone: But the effect was different, where the remedy is suspended *by the act of law* (*c*): Thus, if administration of the effects of a creditor were committed to the debtor, this, being by act of law, was held to be only a temporary privation of the remedy (*d*): Therefore, if the obligor of a bond took out administration to the obligee, and died, the administrator *de bonis non* of the obligee might maintain an action for such debt against the executor of the obligor (*e*). Again, if the executrix of the obligee married the obligor, such marriage was no release of the debt: for the testator had done no act to discharge it (*f*): Consequently the remedy was merely suspended by the legal effect of the coverture; and, on her death, the administrator *de bonis non* was entitled to that debt, as well as to any others outstanding (*g*): But if the obligee made the wife of the obligor his executrix, this operated as a release (*h*). It is a general rule of law that an obligation in which the husband is obligor and the wife obligee is destroyed by the marriage. But there are exceptions to this rule in favour of third parties. Thus, where the wife is entitled to the bond as legal personal repre-

Debtor
appointed
administrator.

(*a*) *Holliday v. Boas*, 1 Roll. Abr. 920, 921; Exors. (G.) pl. 13; *Woodward v. Lord Darcy*, Plowd. 186; *Dorchester v. Webb*, Cro. Car. 373; Touchst. 497, 498; *Wankford v. Wankford*, 1 Salk. 305, by Holt, O. J. The author of "The Office of an Executor" seems to be of opinion that the debt will be assets in equity only: Ch. 2, pp. 73, 74, 14th edit.

(*b*) 1 Salk. 306.

(*c*) *Wankford v. Wankford*, 1 Salk. 303, by Powell, J.

(*d*) Wentw. Off. Ex. Ch. 2, p. 76, 14th edit.; *Needham's Case*, 8 Co. 136, *a*; *Wankford v. Wankford*, 1 Salk. 306, by Holt, O. J.

(*e*) *Lockier v. Smith*, 1 Sid. 79; *Hudson v. Hudson*, 1 Atk. 461.

(*f*) *Needham's Case*, 8 Co. 136, *a*; Co. Litt. 264, *b*; *Wankford v. Wankford*, 1 Salk. 306, by Holt, O. J.

(*g*) *Crosman's Case*, 1 Leon. 320; *Wankford v. Wankford*, 1 Salk. 306, by Holt, O. J.; Toller, 349.

(*h*) *Fryer v. Gildridge*, Hob. 10.

sentative, and the extinguishment of the obligation would prejudice creditors or legatees, it will not take place. But where the wife, besides being personal representative, is residuary legatee, and it is shown that the debts and legacies have been paid, there, the reason for the exception ceasing, the exception ceases (*i*).

It was decided in *Caweth v. Phillips* (*k*), that making a debtor executor *durante minore ætate* of another person does not discharge the debt; on the ground that the debtor is only executor in trust for the other during his minority.

It may also be proper in this place to mention the case of *Stapleton v. Truelock* (*l*): There the testator made B. and C. his executors, and added, "I Will that C. shall pay to my other executor all such debts as he oweth me, before he shall meddle with anything of this my Will, or take any advantage of this my Will for the discharge of the same debts, for that I have made him one of my executors." And it was held that C. could not administer, or be executor, before he paid the debts.

In equity.

The effect in equity (*m*), of the appointment of a debtor to the office of executor, is, as there has already been occasion to state, that the debt due from the debtor executor is considered to have been paid to him by himself; and upon this supposition it is an established rule in equity that the executor shall be accountable for the amount of his debt as assets (*n*): And it would seem to be settled, that the debt is general assets, not only for the payment of the testator's debts, but also of his legacies (*o*). And if the debt were a specialty debt, it would

(*i*) *Re Price*, 11 C. D. 163, *per* Jessel, M. R.

(*k*) 1 Lord Raym. 605.

(*l*) 3 Leon. 2, pl. 6.

(*m*) See *ante*, p. 1053.

(*n*) See the judgment of Lord Tenterden in *Freakley v. Fox*, 9 B. & C. 134. In *Ingle v. Richards*, 28 Beav. 366, a testator died in 1842, having appointed T. R. and others his executors: T. R., who owed the testator 300*l*. on his promissory note, did not prove the Will till 1855: And it was held by Romilly, M. R., that he could not then set up the Statute of Limitations in respect of the debt; that the act of proving had relation to the testator's death; and that he must be considered as having the 300*l*. in his hands as assets and be charged therewith, with interest, from 1855.

(*o*) *Flud v. Rumcey*, Yelv. 160; *Phillips v. Phillips*, 2 Freem. 11; *Errington v. Evans*, 2 Dick. 456; *Carey v. Goodinge*, 3 Bro. C. O. 111; *Berry v. Usher*, 11 Ves. 90; *Simmons v. Gutteridge*, 13 Ves. 264; Bac. Abr. Exors. (A.) 10; *Re Price*, 11 C. D. 163. See also *In the goods of Boddington*, 6 Notes of Cas. 18; *Tomlin v. Tomlin*, 1 Hare, 247.

have remained so, and would have retained its priority as against the estate of the executor, in the event of his death, as though a stranger had been appointed executor (*p*).

There are, indeed, some authorities for considering the appointment in the light of a specific legacy to the debtor for the purpose of discharging the debt, and that, therefore, although, like all other legacies, it is not to be paid or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees (*q*): And Lord Talbot, in *Brown v. Selwyn* (*r*), speaks of the question as being at that time unsettled, whether such a debt was assets to pay legacies in general, though he inclines to be of opinion in the affirmative. However, Lord Thurlow, in *Carey v. Goodinge* (*s*), and Sir William Grant, in *Berry v. Usher* (*t*), treat the point as perfectly settled, that the appointment of a debtor to be executor is no more than a parting with the action, and that a trust is accordingly raised in equity, not only for a residuary legatee (*u*), but even for a next of kin (*x*).

The appointment of a debtor as executor will operate even in equity as a release of the debt if the rights of creditors are not interfered with, and there is evidence to show the intention of the testator to release the debt by the appointment, because, there being a legal act which released the obligation, there is in such case no equity against the debtor to deprive him of the benefit.

The principle laid down in *Strong v. Bird* (*y*) applies not

(*p*) *Turner v. Cox*, 8 Moo. P. C. 288, 315.

(*q*) Co. Lit. 264, *b*, note (1), by Butler; 2 Black. Com. 512; Toller, 349; But Lord Holt, in *Wankford v. Wankford*, 1 Salk. 306, denies that the making a debtor executor amounts to a legacy: And even if it did, it should seem that he would have no right of retainer against other specific legatees. See *post*, p. 1087.

(*r*) Cas. temp. Talb. 242.

(*s*) 3 Bro. C. C. 111.

(*t*) 11 Ves. 90.

(*u*) *Brown v. Selwyn*, Cas. temp. Talb. 240.

(*v*) *Carey v. Goodinge*, 3 Bro. C. C. 110.

(*y*) *Strong v. Bird*, L. R. 18 Eq. 315; explained and followed in *Re Pink*, [1912] 2 Ch. 528. See also *per* Byrne, J., in *Re Griffin*, [1899] 1 Ch. 408, 412; and *Re Applebee*, [1891] 3 Ch. 422, in which *Strong v. Bird* was followed, and in which Stirling, J., discusses the admissibility of evidence to prove (a) the intention of the testator to release the executor by means of his appointment; (b) the intention in testator's lifetime to forgive the debt; (c) the circumstances rendering it inequitable for the residuary legatee to refuse to give effect to the intention of the testator as proved. The evidence would seem

only to cases of release of debt, but also to cases of imperfect gifts *inter vivos* which may therefore be perfected by the donor appointing the donee his executor, and it is immaterial that the donee is only one of several executors (z). But the principle ought not to be further extended so as to apply to a gift of money which is not sufficiently identified to enable it to be separated from the rest of the testator's property or to a mere promise to give on a future occasion (a).

3. *Of the effect of appointing a Creditor to be Executor.*

There has already been occasion to consider the privilege enjoyed by a creditor, who is appointed to the office of executor, of retaining for his own debt out of the assets, in priority to all other creditors of equal degree (b): But it remains further to investigate how far that appointment and the consequent privilege operate as an extinguishment of the claim of the executor.

Where
creditor is
sole executor:

If a debtor makes his creditor, or the executor of his creditor, his sole executor, this alone is no extinguishment of the debt, though there be the same hand to receive and pay: Yet *if the executor has assets of the debtor*, it is an extinguishment; because then it is within the rule that the person who is to receive the money is the person who ought to pay it: But if he has no assets, then he is not the person who ought to pay, though he is the person that is to receive it (c): The debt, in other words, is not extinct, unless upon a supposition that the executor has assets, which he may retain to pay himself (d).

admissible on the ground that it is not to alter or add to the Will, but merely to negative an equity in favour of the residuary legatee arising on a presumption. In *Re Hyslop*, [1894] 3 Ch. 522, North, J., held that a letter of instructions to an executor debtor not communicated to him during the life of the testator, nor properly executed as a Will, was inadmissible as evidence of the cancellation of the debt.

(z) *Re Stewart*, [1908] 2 Ch. 251; *Re Stoneham*, [1919] 1 Ch. 149.

(a) *Re Innes*, [1910] 1 Ch. 188.

(b) See *ante*, Pt. III. Bk. III. Ch. II. § VI.

(c) *Woodward v. Lord Darcy*, Plowd. 185; *Fryer v. Gildridge*, Hob. 10; *Cock v. Cross*, 2 Lev. 73; *Wankford v. Wankford*, 1 Salk. 305, by Holt, C. J.

(d) By Powell, J., in *Wankford v. Wankford*, 1 Salk. 304. Accordingly, where a promissory note was, at maturity, in the hands of the payee, who was one of the two executors of the drawer, and it was afterwards endorsed by the payee to the plaintiff, who, as endorsee, sued the payee and his co-executor as the executors of the drawer; and they pleaded the facts above stated, alleging also that the payee

Therefore, if the obligor made the obligee his executor, and he had no assets, he might sue the heir, if the heir was bound(e): But it is said, that if he pay himself any part of his debt by retaining out of the assets, he cannot sue the heir for the residue; for he cannot apportion his debt, but he ought to retain goods for the whole, or have an action for the whole against the heir (f).

The law is the same, if one of several joint and several debtors makes their common creditor his sole executor: Therefore if such executor has assets, the debt is extinct, and he cannot sue the other debtor; for the having assets amounts to payment(g).

where one of several debtors makes the creditor executor:

Again, the same doctrine prevails where the debtor appoints his creditor to be one of several executors, *if the creditor administers (h)*: But if the creditor neither proves the Will, nor acts as executor, he may bring an action against the other executor (i); nor is it necessary, to enable him so to do, that he should renounce in the Court of Probate (k). So if the debtor makes the creditor and another his executors, and the creditor does not administer, but dies, his executor shall have an action against the surviving executor (l).

where a creditor is one of several executors.

It may be proper, in this place, to mention the case of *Ashley v. Childers (m)*: There a man died intestate, and a stranger possessed himself of the intestate's goods: Afterwards letters of administration were granted to a creditor of the intestate, who brought an action for the debt due to him by the intestate,

Action by creditor administrator for his own debt against executor *de son tort*.

had assets of the testator before the endorsement; it was held, that the allegation as to the payee having assets was material, for otherwise the debt was not gone, and the instrument was still negotiable: It was further held that the allegation must be taken to mean legal assets presently available; and, therefore, it was not sustained by proof that the testator had devised to the payee a house charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts and legacies: *Lowe v. Peskett*, 16 C. B. 500; *Richards v. Moloney*, 2 Ir. Ch. 1.

(e) 1 Roll. Abr. 940, (M.) pl. 5; *Pidgeon v. Pitts*, 2 Show. 401, pl. 273; *Wankford v. Wankford*, 1 Salk. 304, by Powell, J.; Co. Lit. 264, b, note by Butler.

(f) *Woodward v. Lord Darcy*, Plowd. 185, 186; Wentw. Off. Ex. 78, 14th edit.

(g) *Wankford v. Wankford*, 1 Salk. 305, by Holt, C. J.; and *Locke v. Crosse*, cited by Holt, C. J.

(h) *Woodward v. Lord Darcy*, Plowd. 184; *Dorchester v. Webb*, Cro. Car. 372.

(i) *Dorchester v. Webb*, W. Jones, 345.

(k) *Rawlinson v. Shaw*, 3 T. R. 557.

(l) *Woodward v. Lord Darcy*, Plowd. 184.

(m) 1 Roll. Abr. 940, Extinguishment, (M.) pl. 5.

against the stranger, as executor of his own wrong: The question was, whether the creditor, by taking the letters of administration, had not suspended his action for the time he continued to be administrator: And Twisden, J., held that he had: But the rest of the Court held, that, as there was an averment by the plaintiff that he had no assets to satisfy his debt, the action was not suspended, but was sustainable; for the reason why the creditor's taking out administration is said to suspend or extinguish the action is on supposition of assets.

CHAPTER THE THIRD.

THE ADEPTION OF LEGACIES.

IF a gift to one legatee in the earlier part of a Will be inconsistent with a subsequent gift to another legatee in the Will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift (a).

Ademption by inconsistent legacy.

SECTION I.

Ademption of Specific Legacies.

The general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie* as described in the Will: otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed (b). The law is that where you find a change in the thing bequeathed ademption will follow, unless it can be shown that the thing is changed in name or form only and remains substantially the same (c).

It must be here observed that the rule of ademption does not

Demonstrative legacies :

(a) See *Kermode v. McDonald*, L. R. 1 Eq. 459, 460; L. R. 3 Ch. 584; *Re Stoodley*, [1916] 1 Ch. 242.

(b) *Ashburner v. M'Guire*, 2 Bro. O. O. 110. So where the testator took the goods bequeathed with him on a voyage, and the ship was lost at sea and the goods perished, and he was drowned; it was held, that as it could not be shown that the testator died before the goods perished, the legatee had no interest in them, and no claim on the money for which they had been insured: *Durrant v. Friend*, 5 De G. & Sm. 343.

(c) *Re Slater*, [1907] 1 Ch. 665.

apply to *demonstrative* legacies: *i.e.*, to legacies of so much money with reference to a particular fund for payment: as for instance, legacies given *out of* a particular stock (*d*), or debt (*e*), or term (*f*): for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate (*g*).

It is now proposed further to consider the rule above laid down, and certain qualifications of it, by applying it to some of the examples of specific legacies heretofore adduced (*h*).

Ademption of
specific legacy
of a debt:

As to the ademption of specific legacies of debts and securities for money: If a debt specifically bequeathed be received by the testator, the legacy is adeemed: because the subject is extinguished, and nothing remains to which the words of the Will can apply (*i*). Thus, in *Rider v. Wager* (*k*), the testator specifically bequeathed to A. part of a debt due to him from B., and the remainder to C.: The testator called in the money: And Lord King determined that the legacy was extinguished; and further held in the same case, the testator having bequeathed to D. a debt which D. owed him, that this legacy was adeemed by payment of the money in his lifetime. Again, in *Gardner v. Hatton* (*l*), a testator bequeathed the interest of 7,000*l.* secured on mortgage of an estate at Worstead, in the county of Norfolk, belonging to Mr. Robert Tuck: The 7,000*l.* and interest were received after the date of the Will by the testator's agent, on his account, and immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other moneys, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount: And Sir L. Shadwell, V.-C., held that the legacy was specific, and notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed.

So a partial receipt by the testator of the debt specifically bequeathed will operate as an ademption *pro tanto*. Thus, in *Ashburner v. M'Guire* (*m*), where a bond debt was bequeathed,

(*d*) *Ante*, p. 922.

(*e*) *Ante*, p. 925.

(*f*) *Ante*, p. 927.

(*g*) *Ante*, p. 917.

(*h*) *Ante*, p. 918 *et seq.*

(*i*) *Badrick v. Stevens*, 3 Bro. O. C. 431.

(*k*) 2 P. Wms. 329, 330; *Stanley v. Potter*, 2 Cox, 180; *Sidney v. Sidney*, L. R. 17 Eq. 65.

(*l*) 6 Sim. 93; cf. *Re Bridle*, 4 O. P. D. 336.

(*m*) 2 Bro. C. C. 108.

the obligor became bankrupt, and the testator received a dividend under the commission in respect of the debt: Lord Thurlow held, that this receipt was an ademption *pro tanto*. So in *Fryer v. Morris* (*n*), where the specific legacy was of money due on a note for 400*l.*, and the testatrix received 385*l.* 18*s.* of the debt, Sir William Grant determined that the receipt of that sum was an ademption, on the ground of all the preceding decisions, viz., that the thing given and described no longer existed.

Such being the principle by which the ademption of specific legacies is governed, the fallacy is obvious of a distinction formerly taken with respect to a specific legacy of a debt, viz., between a compulsory and a voluntary payment of it to the testator; but it was finally established, according to the words of Lord Thurlow, in *Humphries v. Humphries* (*o*), that “the only rule to be adhered to is to see whether the subject of the specific bequest remained in *specie* at the time of the testator’s death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion ” (*p*).

A distinction was made by Sir John Stuart, V.-C., in the case of *Clark v. Browne* (*q*) between the gift of a debt *quâ* debt and the gift of the sum of money produced when the debt shall have been recovered and ceased to exist as a debt; as for example, where there is a gift of “whatever sum may be received from my claim on A. B.”: In such a case it may be inferred that the testator contemplated the recovery of the debt in his own lifetime, and that the subject of the gift is not the debt itself, but the amount recovered in respect of it; and the receipt of such amount by the testator will be no ademption: at all events if he sets it apart, and does not mix it with the general mass of his property. But from this decision, as well as from that of Sir W. Grant, in the earlier case of *Le Grice v. Finch* (*r*), Sir G. Jessel, M. R., dissented (*s*), holding these cases always to be

(*n*) 9 Ves. 360.

(*o*) 2 Cox, 185.

(*p*) *Jones v. Southall*, 32 Beav. 31. For an instance of a receipt which does not amount to an ademption, see *Graves v. Hughes*, 4 Madd. 381.

(*q*) 2 Sm. & G. 524.

(*r*) 3 Mer. 50.

(*s*) *Harrison v. Jackson*, 7 O. D. 339. See also *Manton v. Tabois*, 30 C. D. 92, *per* Bacon, V.-C.

cases of construction; that is, to turn on the question whether the gift was of the money as invested, or of the proceeds of the fund however invested (*t*).

Ademption of
gifts under
powers of
appointment:

The doctrine of ademption applies to an appointment by Will, whether made under a general or under a special power, and such an appointment fails in case of the non-existence at the death of the testator of either the object or the subject of the appointment (*u*).

Ademption of
a specific
legacy of
stock.

When stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed, as the case may be. Thus, in *Ashburner v. M'Guire* (*x*), the testator made the following bequest: "To A., now at school, &c., my capital stock of 1,000*l.* in the India Company's stock, with the dividends, &c.:" The fund was afterwards sold by the testator: And Lord Thurlow decided that the legacy was adeemed (*a*).

And it is said, that the legacy is irretrievably adeemed by the sale of the stock; and will not be revived by a new purchase

(*t*) In *Moore v. Moore*, 29 Beav. 496, and *Morgan v. Thomas*, 6 C. D. 176, it was held, on the construction of the Wills in question, that the gift was of the proceeds of the fund and that the money could be traced: *Re Bythway*, 80 L. J. Ch. 246. But see and cf. *Re Bridle*, 4 C. P. D. 336, where a testator bequeathed to his niece, L. B., a mortgage of 200*l.*, which was subsequently redeemed during the testator's lifetime, and it was held that the bequest was adeemed, although the testator had placed the mortgage money to a separate account at his banker's, and put the pass book into the hands of the legatee.

(*u*) *Re Dowsett*, [1901] 1 Ch. 398; *Re Moses*, [1902] 1 Ch. 100; [1903] A. O. 13. In *Re Johnstone's Settlement*, 14 C. D. 162, where the Will was made in exercise of a power of appointment, the legacies were held not to be adeemed by a subsequent change of investment.

(*x*) 2 Bro. O. C. 108.

(*a*) See also *Harrison v. Jackson*, 7 C. D. 339. And where a testator having certain debentures at the date of his Will thereby gave "all my debentures" upon certain trusts, and after the date of the Will the testator exercised an option given to him by the company who had issued the debentures and converted them into debenture stock of the same company; it was held that the debenture stock did not pass: *Re Lane*, 14 C. D. 856. But see *Re Herring*, [1908] 2 Ch. 493; and cf. *Re Nottage*, [1895] 2 Ch. 657; *Re Weeding*, [1896] 2 Ch. 364. A gift of "all my interest in the Coventry Street Estate" was held to be adeemed by the sale of the estate subsequently to the Will, although the purchase money stood on deposit at the testator's bankers at the time of his death: *Manton v. Tabois*, 30 C. D. 92. It sometimes happens that a gift held not to be specific, but general, fails through the non-existence of a standard of value; for instance, a gift of so much money as will buy fifty shares in a company which at the death of the testator had been reconstructed and had ceased to exist: *Re Gray*, 36 C. D. 205.

of similar stock by the testator (*b*). In *Pattison v. Pattison* (*c*), a testator gave to Margaret Forbes, whom he afterwards married, among other bequests the sum of 50*l.* Long Annuities, which he described as purchased with 1,000*l.* left him by the Will of James Tillard: After his marriage he made a codicil, by which he confirmed to his wife the benefits given to her by his Will, in addition to the provision made for her by her marriage settlement: He afterwards sold his Long Annuities, and with the produce purchased new Annuities, which differed only from the Long Annuities by being terminable a quarter of a year sooner: Subsequently to this transaction, he made another codicil, by which he confirmed his Will and former codicil: and Sir John Leach, M. R., held, that the legacy of 50*l.* Long Annuities was adeemed: his Honour observing that the law was settled, that a legacy is adeemed if the specific thing do not exist at the testator's death.

There was a time when the Courts held that ademption was dependent on the testator's intention, and on a presumed intention on his part, and it was therefore held in the old days that when a change was effected by public authority or without the will of the testator ademption might not follow. But for many years that has ceased to be law, and it is now the law that where you find a change of property effected by virtue even of an Act of Parliament, ademption will follow unless you can show that the property is changed in name or form only and remains substantially the same (*d*). Accordingly where a testator bequeathed the interest arising from "money invested in the Lambeth Waterworks Company," and after the date of the Will the testator's stock was converted into stock of the Metropolitan Water Board, it was held that the bequest of the stock had been adeemed (*e*). In *Re Clifford* (*f*), where there was a specific bequest of "twenty-three of the shares belonging to me" in a certain company, and the original shares of 80*l.* each had been sub-divided into four new 20*l.* shares, it was held that the

(*b*) But see the *dicta* of Lord Talbot in *Partridge v. Partridge*, Cas. temp. Talb. 227; of Lord Hardwicke in *Evelyn v. Ward*, 1 Ves. Sen. 426; and of Sir Thomas Clarke, in *Drinkwater v. Falconer*, 2 Ves. Sen. 625.

(*c*) 1 M. & K. 12.

(*d*) *Re Slater*, [1907] 1 Ch. 665. See also *Oakes v. Oakes*, 9 Haro. 666.

(*e*) *Ibid.*

(*f*) [1912] 1 Ch. 29; cf. *Re Gillins*, [1909] 1 Ch. 345.

original shares though changed in form were substantially the same, and that there was no ademption.

Cases where specific legacy of stock is adeemed.

Under the old law there was no ademption where the stock has been transferred into another fund without the knowledge or authority of the testator (*g*); nor where the stock was merely transferred, with the testator's consent, from the name of his trustee into his own (*h*); or, as it would seem, from the names of old to those of new trustees, or from the specified fund to a fresh security, under a power so to do (*i*).

Ademption of specific legacy of partnership share :

If a partner, under articles providing for the renewal of the partnership, specifically bequeaths his share of the profits (naming the amount), and upon the expiration of the old, new articles are entered into, by which his share of the profits is altered, the legacy will not be revoked by ademption (*k*).

Ademption of specific legacy of goods :

As to ademption of specific legacies of goods, it must be observed, that where the disposition of the subject is not absolute, the legacy will not be adeemed: As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death; so as to enable him to call on the executor to redeem and deliver it to him (*l*).

not by pawning :

when by removal.

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them: Thus where the testator bequeathed all his books at his chambers in the Temple; and afterwards removed his books into the country, this was held to extinguish the legacy (*m*). So where the bequest was of all the testator's household goods, plate, linen, china, &c., &c., which should be in or about his dwelling-house at B. at the

(*g*) *Shaftesbury v. Shaftesbury*, 2 Vern. 747; *Basan v. Brandon*, 8 Sim. 171. So, where the subject of a specific legacy was sold during the testator's lunacy by his son, it was held by Stuart, V.-C., that there was no ademption: *Jenkins v. Jones*, L. R. 2 Eq. 323. But where after the Will a testator was found a lunatic, and by an order in the lunacy certain shares specifically bequeathed were directed to be sold and the proceeds invested in other securities, the bequest of such shares was held to be adeemed: *Jones v. Green*, L. R. 5 Eq. 555; *Re Freer*, 22 C. D. 622.

(*h*) *Dingwell v. Askew*, 1 Cox, 427.

(*i*) Cf. *Re Johnstone's Settlement*, 14 C. D. 162.

(*k*) *Blackwell v. Child*, Ambl. 260.

(*l*) *Ashburner v. M'Guire*, 2 Bro. C. C. 113, by Lord Thurlow.

(*m*) *Green v. Symonds*, 1 Bro. C. C. 129, in note. But see *Cunningham v. Ross*, *post*, p. 1067; *Norris v. Norris*, *post*, p. 1068.

time of his death; and he afterwards took another house, into which he removed the greater part of the furniture from the house at B.; this removal was held an ademption (*n*). Again, where the testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein, and the lease having expired in his lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures, and other articles, was removed to a house which the testator took in Edward Street; it was held, that the legacy was adeemed; because it was clear that the testator made the bequest of the furniture, &c., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, &c., and, consequently, that the bequest had totally failed by the change of circumstances (*o*).

But no ademption by removal, it would seem, will take place, where the goods are removed for their preservation, as to save them from fire (*p*); or, where they are removed by fraud, or without the testator's knowledge or authority (*q*); or where, by the nature of the place described, it is clear that their locality was not referred to as essential to the bequest, as in the case of a specific legacy of goods in a ship (*r*); or where the testator has two houses, in which he lives alternately, and being possessed of one set of furniture only, which he removes with himself to each house, bequeaths, while residing in one of them, all his furniture in that house (*s*).

Cases where
no ademption
by removal.

In *Cunningham v. Ross* (*t*), a testator bequeathed all his bills, bonds, &c., belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith: At his death the testator had no effects in the house of Mr. Smith: It was contended that the legacy failed, on the authority of the case of *Shaftesbury v. Shaftesbury* (*u*), in which case the testator devised to his wife all his goods that should be in his house, and before his death he

(*n*) *Heseltine v. Heseltine*, 3 Madd. 276. See also *Spencer v. Spencer*, 21 Beav. 548.

(*o*) *Colleton v. Garth*, 6 Sim. 19.

(*p*) *Chapman v. Hart*, 1 Ves. Sen. 273; *Re Johnston*, 26 C. D. 538, 553.

(*q*) *Shaftesbury v. Shaftesbury*, 2 Vern. 747.

(*r*) *Chapman v. Hart*, 1 Ves. Sen. 273.

(*s*) *Land v. Devaynes*, 4 Bro. C. C. 537; *Rawlinson v. Rawlinson*, 3 C. D. 302.

(*t*) 2 Cas. temp. Lee, 272.

(*u*) 2 Vern. 747.

removed all the goods from the said house, and the devise was held void: But Sir George Lee was of opinion that the present case differed from that; for there the testator devised all his goods *that should be in his house*, which implied, that should be there at his death; but in the present case the words were only descriptive of what the testator meant to bequeath; and therefore it was immaterial whether they remained at Smith's house at the time of his death or not.

Again, in *Norris v. Norris* (x), a testator bequeathed to his wife as follows:—"All my interest in my house at Lavender Hill, the furniture, books, pictures, wines, &c., &c.": After the date of his Will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate: He afterwards purchased more of these articles, and died at Spencer Lodge. And it was held by Knight Bruce, V.-C., that the testator's wife was entitled to the furniture, books, pictures, wines, and plate, which he had at the time of his death.

Ademption of
legacies of
terms for
years :

As to the ademption of specific legacies of terms for years; generally speaking, when the testator expresses himself in the present tense, and all the words directly refer to a lease of which he was *then* possessed, a specific legacy of such lease will be adeemed by a surrender; and a new term, acquired by the testator upon a renewal of the surrendered lease, will not pass to the specific legatee (y): but such an ademption will, it appears, be effected only when the testator has the *legal* estate in the term specifically bequeathed: for where the testator is merely a *cestui que trust*, and the equitable interest only is bequeathed, the Court will not permit a mere surrender of the old lease by the testator and his trustee to defeat the specific legacy, but will consider the intention of the testator appearing upon the Will (z).

And even before section 24 of the Wills Act, 1837, no such ademption would have taken place when the expressions of the bequest had a prospective or future operation, as where they were of "all the estate which *I have or shall have to come* in the

(x) 2 Coll. 719.

(y) *Abney v. Miller*, 2 Atk. 593, 597. See also *Rudstone v. Anderson*, 2 Ves. Sen. 418; *Hone v. Medcraft*, 1 Bro. C. C. 261; *Porter v. Smith*, 16 Sim. 251; *Cooper v. Mantell*, 22 Beav. 223. But see sect. 24 of the Wills Act, *infra*.

(z) *Carte v. Carte*, 3 Atk. 174; *Slatter v. Noton*, 16 Ves. 201.

land held by me under a lease from A." (a); or where the old lease containing a covenant on the part of the lessor to renew, the lessee bequeathed "all my right and interest under or *by virtue* of the lease" (b). Lastly, a surrender of a lease will not operate as an ademption, where the bequest is not specific; as where the testator devises "all and singular my leasehold estate, goods, chattels, and personal estate whatsoever" (c).

By section 23 of the Wills Act, "no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death" (d). And by section 24, "every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will" (e).

1 Viet. c. 26,
s. 23:
bequest not to
be rendered
inoperative
by any
subsequent
conveyance
or act.

Sect. 24.
Will shall be
construed to
speak from
the death of
the testator.

The consequence of the 23rd section above stated is, that all those cases in which it was formerly held that a Will was revoked by an alteration of the estate of the testator are put an end to, and a Will can only be revoked by marriage, by express declaration in writing, or by burning, &c. Accordingly, where

(a) *James v. Dean*, 11 Ves. 383, 389; *Abney v. Miller*, 2 Atk. 599; *Slatter v. Noton*, 16 Ves. 199; *Colegrave v. Manby*, 6 Madd. 84.

(b) 1 Rep. Leg. 311, 312, 3rd edit.

(c) *Stirling v. Lydiard*, 3 Atk. 199; *Digby v. Legard*, 2 Dick. 500. See *ante*, p. 928; but see *James v. Dean*, 11 Ves. 390.

(d) Thus in *Saxton v. Saxton*, 13 C. D. 359, a testator bequeathed to his wife all his term and interest in a leasehold house in which he then resided, and after the date of the Will purchased the freehold, and it was held that the wife took the freehold. But in *Re Knight*, 34 C. D. 518, where a testator gave the lease of the house in which he should be living at the time of his decease to his wife, and at the date of the Will was living in a house held by him for a short term at a rack rent, a freehold house which he subsequently bought and went to reside in was held not to pass to his widow under the devise. Notwithstanding the Wills Act, if a testator devises real estate and afterwards sells it, and the purchase is not completed till after his death, the purchase-money belongs to his personal representatives and not to his devisee: *Farrer v. Winterton*, 5 Beav. 1; *ante*, p. 506; *Moor v. Raisbeck*, 12 Sim. 123. See *Gale v. Gale*, 21 Beav. 349; *Blake v. Blake*, 15 C. D. 481; *In the goods of Lloyd*, 9 P. D. 65.

(e) The cases as to the construction of this section will be found collected, *ante*, pp. 145—148, and *post*, Pt. III. Bk. III. Ch. IV. § 8.

a testator devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them on other trusts, it was held that the deed was not a writing declaring an intention to revoke within the 20th section; and therefore that the Will operated on such estate and interest as the testator possessed in the property at his death (*f*).

SECTION II.

Ademption of Legacies given as Portions.

Ademption of
legacy given
by father as
a portion.

As to the ademption of legacies given as portions to children by their father: On this subject an artificial doctrine prevails in Courts of Equity, the establishment of which has excited the regret and censure of more than one eminent modern Judge, though it has also met with approbation from other high authorities. The rule is, that where a father gives a legacy to a child, it must be understood *as a portion*, although not so described in the Will, because it is a provision by a parent for his child (*g*): and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, not only in cases where the advancements are larger than, or equal to, the testamentary portions (*h*), but also, it has been said, in cases where the sums advanced are *less* than the sums bequeathed (*i*). But it was decided by Lord

(*f*) *Ford v. De Pontes*, 30 Beav. 572.

(*g*) By Lord Eldon, in *Ex parte Pye*, 18 Ves. 153. See also the judgment of Wigram, V.-C., in *Suisse v. Lowther*, 2 Hare, 434 *et seq.*; *Re Lacon*, [1891] 2 Ch. 482; *Re Scott*, [1903] 1 Ch. 1. The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the Will, though without reference to any special application of the money: *Re Pollock*, 28 O. D. 552; *Re Ashton*, [1897] 2 Ch. 574 (reversed on appeal on the evidence, [1898] 1 Ch. 142).

(*h*) *Ward v. Lant*, Prec. Chanc. 182; *Jenkins v. Powell*, 2 Vern. 115; *Upton v. Prince*, Cas. temp. Talb. 71; *Scotton v. Scotton*, 1 Stra. 236; *Watson v. Lord Lincoln*, Ambl. 325; *Grave v. Salisbury*, 1 Bro. C. C. 427; *Carver v. Bowles*, 2 Russ. & M. 301; *Montague v. Montague*, 15 Beav. 565; 22 Beav. 488; *Hopwood v. Hopwood*, 7 H. L. C. 728; *Re Scott*, *ubi supra*.

(*i*) *Hartop v. Whitmore*, 1 P. Wms. 681; *Clarke v. Burgoine*, 1 Dick. 353; *Ex parte Pye*, 18 Ves. 153. Where a sum is secured by a settlement on the marriage of the child, it is not necessary that it should be paid in order to operate as an ademption of a previous legacy: *Hopwood v. Hopwood*, 7 H. L. C. 728.

Cottenham, in *Pym v. Lockyer* (*k*), after a careful investigation of all the authorities, that where the portion is less than the legacy, it shall operate only as an ademption *pro tanto*. The legacy will not be set up by a codicil, made after the settlement, ratifying and confirming the Will, and all the devises and bequests therein contained (*l*).

A sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance (*m*).

The presumption against double portions will not be repelled, although there may be a difference between the nature of the provision made by the Will and of the provision under a subsequent settlement (*n*). And therefore the application of the principle of ademption will not be prevented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement. This doctrine was settled by the decision of the House of Lords in *Durham v. Wharton* (*o*). In this respect

(*k*) 5 M. & Cr. 29; *Re Pollock*, 28 C. D. 552, 556. See *Kirk v. Eddowes*, 3 Hare, 515; *Re Blundell*, [1906] 2 Ch. 222. Where the advance is a gift of stock, its value must be ascertained as at the time of the gift: *Watson v. Watson*, 33 Beav. 576; *Re Crocker*, [1916] 1 Ch. 25. See also *Re Beddington*, [1900] 1 Ch. 771, where it was held that when estate duty is payable by reason of the death of the testator within one year of the gift, the amount should be deducted from the value of the gift: *Re Crocker*, [1916] 1 Ch. 25.

(*l*) *Booker v. Allen*, 2 Russ. & M. 270; *Powys v. Mansfield*, 3 Mylne & Cr. 359; *Montague v. Montague*, 15 Beav. 565; *Hopwood v. Hopwood*, 7 H. L. C. 728.

(*m*) *Taylor v. Taylor*, L. R. 20 Eq. 155; *Re Scott*, [1903] 1 Ch. 1 (overruling in effect, *Boyd v. Boyd*, L. R. 4 Eq. 305, and *Re Blockley*, 29 C. D. 250).

(*n*) *Trimmer v. Bayne*, 7 Ves. 508; *Ex parte Pye*, 18 Ves. 153; *Hartopp v. Hartopp*, 17 Ves. 184; *Sheffield v. Coventry*, 2 Russ. & M. 317; *Platt v. Platt*, 3 Sim. 503; *Phillips v. Phillips*, 34 Beav. 19; *Dawson v. Dawson*, L. R. 4 Eq. 504. Where the settlement is made after the Will the presumption against double portions will not be repelled even by great differences in the nature of the gift by Will, and the obligations entered into by the testator settlor under the settlement. The difference between such a case and the class of cases of which *Chichester v. Coventry* (L. R. 2 H. L. 71; *ante*, p. 1046, note (*j*)) is a leading example, is that in this last class of cases where the settlement precedes the Will a debt has been created anterior to the gift by Will and the gift has been construed not as a satisfaction of the debt, but rather as an additional bounty, especially where the Will contains an express direction for payment of debts: *Dawson v. Dawson*, *ubi supra*; *Cooper v. Macdonald*, L. R. 16 Eq. 258; *Stevenson v. Masson*, L. R. 17 Eq. 78. The direction to pay debts seems immaterial where the Will precedes the settlement: *Cooper v. Macdonald*, *ubi supra*.

(*o*) 10 Bligh, 526; 3 Cl. & Fin. 146.

there is a distinction between the principle of the ademption of legacies given as portions, and that of the satisfaction of debts by legacies (*p*).

It was formerly considered that where the bequest to the child is of a residue or part of a residue, the subsequent advance cannot operate as an ademption: because such a gift cannot be considered as a legacy of a portion, which must mean a legacy of a definite sum (*q*). But the contrary doctrine is now fully established (*r*).

The presumption, however, will not prevail, where the testamentary portion and subsequent advancement are not *ejusdem generis* (*s*); or where the subsequent advancement depends upon a contingency, and the testamentary portion is certain (*t*); or

(*p*) *Monck v. Monck*, 1 Ball & Beat. 298; *Durham v. Wharton*, 10 Bligh, 545. Accordingly, if a parent, having made a Will bequeathing a certain sum to a child, takes upon himself to make a settlement of it, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy: Where, therefore, a father makes an absolute gift by his Will to his child, and afterwards, on the marriage of that child, settles a like sum on the husband and wife and their children, the provision of the settlement is a satisfaction of the legacy: *Barry v. Harding*, 1 J. & Lat. 475. Again, where a legacy is given to M. with a contingent limitation over to N., in the event of M. dying without children, and the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached; the legacy is not merely adeemed as to M., but extinguished as to N.: *Twining v. Powell*, 2 Coll. 262. See *Garner v. Holmes*, Cas. temp. Napier, 132, 133; *Phillips v. Phillips*, 34 Beav. 19; *McCarogher v. Whieldon*, L. R. 3 Eq. 236. See, as to the rule laid down in *Chichester v. Coventry*, L. R. 2 H. L. 71, ante, p. 1046, note (*j*); and cf. *Re Tussaud's Estate*, 9 C. D. 363; *Re Vernon*, 95 L. T. 48. For a case where the obligation under the settlement was held not to be a debt payable before the declaration of the residue, see *Bennett v. Houldsworth*, 6 C. D. 671.

(*q*) See *Farnham v. Phillips*, 2 Atk. 215.

(*r*) *Montefiore v. Guedalla*, 1 De G. F. & J. 93. See also *Schofield v. Heap*, 27 Beav. 93; *Beckton v. Barton*, 27 Beav. 99. But the rules as to double portions, though to a certain extent applied to gifts of residue in *Montefiore v. Guedalla*, *ubi supra*, will not be applied for the benefit of a widow or stranger who may have an interest in the residue: *Meinertzen v. Walters*, L. R. 7 Ch. 670; *Re Heather*, [1906] 2 Ch. 230. So the doctrine does not apply at the instance of grandchildren: *Re Dawson*, [1919] 1 Ch. 102.

(*s*) *Holmes v. Holmes*, 1 Bro. C. C. 555; *Davys v. Boucher*, 3 Y. & Coll. 411. A gift of a sum of money to the husband of a daughter by her father, *simpliciter*, after marriage, is not an ademption of a legacy given by him to his daughter: *Ravenscroft v. Jones*, 32 Beav. 669. Nor is an advance to the daughter herself of a sum for her marriage outfit: *ibid.* Nor occasional small gifts, nor an annual allowance of a small sum: *Watson v. Watson*, 33 Beav. 574; *Schofield v. Heap*, 27 Beav. 93.

(*t*) *Spinks v. Robins*, 2 Atk. 491. See further *Crompton v. Sale*,

where a legacy or advancement is not merely given as a portion, but is expressed to be made in lieu of, or compensation for, an interest to which the child was entitled (*u*): In such cases the presumptive ademption by advancement will not take place. It should seem, also, that the principle does not extend to devises of real estate (*x*).

Likewise, this presumption may be rebutted or confirmed by the application of parol evidence of a different intention by the testator (*y*). And where evidence is admissible for that purpose, counter-evidence is also admissible: And it was held by Sir John Leach, M. R., in *Booker v. Allen* (*z*), that if it be proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of the legacy left by the Will, the settlement will be held a satisfaction of the legacy, though the two provisions differ so much from each other, that they cannot be considered substantially the same (*a*). The true rule appears to be that parol evidence is only properly admissible in such cases for the purpose of showing what the testator meant *by the act subsequent to the Will* (*b*). The law on this subject was fully considered, on an examination of all the previous authorities, by Wigram, V.-C., in *Kirk v. Eddowes* (*c*). In that case a testator bequeathed the sum of 3,000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint; and, in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and subject to an annuity, and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely: After the date of the Will, the testator gave to his daughter and her husband a promissory note for 500*l.* then due to the testator: In a suit by the children of the daughter

Admissibility
of parol
evidence.

2 P. Wms. 553. But see also the observations of Lord Cottenham in *Powys v. Mansfield*, 3 Mylne & Cr. 374, 375.

(*u*) *Baugh v. Read*, 1 Ves. 257. But see the observations of Lord Lyndhurst in *Durham v. Wharton*, 10 Bligh, 546.

(*x*) *Davys v. Boucher*, 3 Younge & C. 397.

(*y*) *Trimmer v. Bayne*, 7 Ves. 508; *Powys v. Mansfield*, 3 Mylne & Cr. 359; *Hopwood v. Hopwood*, 7 H. L. C. 728; *Phillips v. Phillips*, 34 Beav. 19, 21; *Re Tussaud's Estate*, 9 C. D. 363; see *ante*, p. 1048, note (*t*); *Fowkes v. Pascoe*, L. R. 10 Ch. 343; *Re Scott*, [1903] 1 Ch. 1.

(*z*) 2 Russ. & M. 270.

(*a*) See also *Lloyd v. Harvey*, 2 Russ. & M. 310.

(*b*) *Hall v. Hill*, 1 Dr. & W. 94, 116—119, 131, 132.

(*c*) 3 Hare, 509, explained in *Re Shields*, [1912] 1 Ch. 591; cf. *Smith v. Conder*, 9 C. D. 170; *Re Lacon*, [1891] 2 Ch. 482.

against the son, claiming to have the legacy of 3,000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the Will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3,000*l.*: and that the testator was advised by his solicitor, that it was not necessary to alter his Will to give it that effect: And the learned Judge held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the Will, of which subsequent transaction there was no evidence in writing: and that the parol evidence was not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation (*d*): and that the advance to the daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the Will for the benefit of the daughter and her children, which was in the nature of a portion: though it might have been otherwise, if the children had been all living at the date of the Will, and been named therein individually, and not merely described as a class.

Testator in
loco parentis
to legatee.

Where the testator is *in loco parentis* to the legatee, the legacy will be considered as a portion, and will be adeemed by a subsequent advancement, in all cases where it would be so, if made by the actual parent (*e*). But where the testator stands neither in the natural nor assumed relation of parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement (*f*); unless the legacy is given for a *particular* purpose, and the testator advances money for the *same* purpose (*g*); or unless the intention otherwise legally

Legacy for a
particular
purpose
adeemed by

(*d*) His Honour disclaimed holding that declarations of the testator made at any other time than contemporaneously with the advance would be admissible. See also *accord. M'Clure v. Evans*, 29 Beav. 422.

(*e*) *Monck v. Monck*, 1 Ball & Beat. 298; *Trimmer v. Bayne*, 7 Ves. 515; *Booker v. Allen*, 2 Russ. & M. 270; *Powys v. Mansfield*, 3 Mylne & Cr. 359; *Twining v. Powell*, 2 Coll. 262; *Fowkes v. Pascoe*, L. R. 10 Ch. 343.

(*f*) *Wetherby v. Dixon*, 19 Ves. 407; *Fowkes v. Pascoe*, *ubi supra*.

(*g*) *Debeze v. Mann*, 2 Bro. C. C. 166; *Monck v. Monck*, 1 Ball & Beat. 303; *Re Pollock*, 28 C. D. 552, 556; *Re Fletcher*, 38 C. D. 373 (where the legacy was of the amount of a debt). A legacy may be treated as intended as satisfaction of a debt, even though the debt may have ceased to exist at the death of the testator, and even though the special purpose of the legacy is not mentioned in the Will. See

appear that the advancement was made with a view to ademption (*h*). A legacy to a trustee for the benefit of an infant, to whom the testator is not *in loco parentis*, is not given for a particular purpose within the above rule, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose (*i*). But a legacy to the trustees of the endowment fund of a hospital is within the rule, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime (*k*).

an advance
for the same
purpose.

The question, who is to be considered as standing *in loco parentis*, with reference to this rule, is one of considerable difficulty (*l*), which must in a great degree depend upon the individual circumstances of each particular case.

The proper definition of a person *in loco parentis* to a child is, a person who *means* to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child (*m*). And it necessarily flows from the rule of presumption that parol evidence is admissible to prove that the testator was in this predicament: For if the acts of a party standing *in loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend; viz., whether he had meant to put himself *in loco parentis*; and as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that

Definition of
person *in loco*
parentis.

Admissibility
of parol
evidence to
prove testator
in loco
parentis.

Re Fletcher, ubi supra, in which case North, J., says, that the case stands in precisely the same position where the existence of the purpose is founded on a presumption of law which there is no evidence to rebut, *e.g.* the presumption that a legacy of exactly the same amount as an existing debt is given in satisfaction of the debt. See also the observations of Lord Cottenham, in *Powys v. Mansfield*, 3 Mylne & Cr. 377. In the following cases the legacy was held *not* to be adeemed by reason of the non-correspondence of the purposes of the legacy and the advancement: *Roome v. Roome*, 3 Atk. 181; *Spinks v. Robins*, 2 Atk. 491; *Re Ashton*, [1898] 1 Ch. 142; *Re Aynsley*, [1915] 1 Ch. 172.

(*h*) *Pankhurst v. Howell*, L. R. 6 Ch. 136; *Re Fletcher*, 38 C. D. 373, 377.

(*i*) *Re Smythies*, [1903] 1 Ch. 259.

(*k*) *Re Corbett*, [1903] 2 Ch. 326; cf. *Re Aynsley, supra*.

(*l*) See the remarks of Lord Eldon in *Ex parte Pye*, 18 Ves. 150; *Bennet v. Bennet*, 10 C. D. 474, 477. The relation must exist at the time of the Will: *Watson v. Watson*, 33 Beav. 574; *Re Ashton*, [1897] 2 Ch. 574.

(*m*) *Powys v. Mansfield*, 3 Mylne & Cr. 359. See *Rogers v. Soutten*, 2 Keen, 598; *Tucker v. Burrow*, 2 H. & M. 519; *Campbell v. Campbell*, L. R. 1 Eq. 383; *Ex parte Pye*, 18 Ves. 154, *per* Lord Eldon.

purpose (*n*). Mothers (*o*), great uncles (*p*), uncles (*q*), grandfathers or grandmothers (*r*), or putative fathers (*s*), are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. But a person may stand *in loco parentis* to a child, though the child resides with, and is maintained by his father (*t*). And when the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and accordingly *primâ facie* adeemed by a subsequent advancement, not only in cases where he is collaterally related to, or the putative father of, the legatee, but also where no relationship of any kind subsists between them (*u*).

(*n*) *Powys v. Mansfield*, 3 Mylne & Cr. 370.

(*o*) *Bennet v. Bennet*, 10 C. D. 474; *Re De Visme*, 2 De J. & S. 17; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Re Ashton*, [1897] 2 Ch. 574.

(*p*) *Shudal v. Jekyll*, 2 Atk. 516, 518.

(*q*) See *Powel v. Cleaver*, 2 Bro. C. C. 517, 518.

(*r*) *Roome v. Roome*, 3 Atk. 183; *Perry v. Whitehead*, 6 Ves. 547; *Lyddon v. Ellison*, 19 Beav. 565; *Re Dawson*, [1919] 1 Ch. 102.

(*s*) *Grave v. Salisbury*, 1 Bro. C. C. 425, cited 6 Ves. 547.

(*t*) *Powys v. Mansfield*, 3 Mylne & Cr. 359, overruling the decision of the Vice-Chancellor, 6 Sim. 528.

(*u*) *Re Pollock*, 28 C. D. 552, 556. The reader is referred to 1 Roper on Legacies, 333, 3rd edit., for an able examination of the question, as to what circumstances are sufficient to invest the testator with the assumed relation of parent to the legatee, and whether parol evidence is admissible to show that the legacy by a testator, who is not actually a parent, was *intended* for a portion. Where parol testimony is given in order to rebut the presumption of ademption (in a case where the evidence establishes the fact that the testator did mean to place himself *in loco parentis*), it is plain that the presumption may be supported by evidence of the same kind: *Powys v. Mansfield*, 3 Mylne & Cr. 370. And the declarations of the party are admissible in evidence for this purpose: *Powys v. Mansfield*, 3 Mylne & Cr. 374.

CHAPTER THE FOURTH.

THE PAYMENT OF LEGACIES.

SECTION. I.

All debts must be paid before any Legacies are satisfied.

IT is obvious, that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them, before he satisfies any description of legacy (*a*).

There is no distinction, in this respect, in favour of specific legacies: Hence if an executor, although acting *bonâ fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4l. per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate: And the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors (*b*).

There has already been occasion to point out, that even *voluntary* bonds and other debts by specialty, must be paid in preference to legacies (*c*).

Voluntary
debts.

(*a*) For this purpose a fund subject to a general power of appointment and passing under a residuary bequest is in the same position as the rest of the personal estate: *Re Hartley*, [1900] 1 Ch. 152.

(*b*) *Spode v. Smith*, 3 Russ. Chanc. Cas. 511. So property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed, more than sufficient to pay his debts, &c., and that the specifically bequeathed property has been made over by the executor to the specific legatee: *Davies v. Nicolson*, 2 De G. & J. 693.

(*c*) *Ante*, p. 783.

Contingent
debts and
liabilities :

With respect to *contingent* debts and liabilities, a question of great importance formerly arose; namely, whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator (or bond, with a condition, or the like) which has never yet been broken, and which may or may not be broken hereafter.

Executor with
notice of even
a possible
liability
cannot safely
pay legacies
or residue :

This question was discussed in *Nector v. Gennet* (d), *Eeles v. Lambert* (e), *Hawkins v. Day* (f), *Pearson v. Archdeaken* (g), and the result seems to be that an executor, with notice of even a possible liability, cannot safely make payment of legacies or pay over the residue to a residuary legatee. If he does, he will have no answer to the claim of the creditor whose contingent claim has ripened into a certain claim. Thus, in *Taylor v. Taylor* (h) it was held that, where executors of a shareholder in a Joint Stock Company which was a going concern at the time of the testator's death, paid a legacy under his Will without providing for any contingent liability in respect of the shares which they retained unsold, they were liable to pay the amount of the legacy in satisfaction of calls (i). As against the legatee, however, the executor may claim repayment of the capital sum which he has paid to the legatee, but without any intermediate income, even though he had notice of the contingent liability at the time when he distributed the estate, but not if, at the time when the legacy was paid, the contingent liability had ripened into a debt of which the executor had notice (j).

when a
legatee must
give security
against
contingent
debts and
liabilities.

Such being the law, it was held that, when such liabilities exist, an executor is not bound to part with the assets, either to a particular or residuary legatee, without a sufficient indemnity; and that a Court of Equity will not compel him to do so without such indemnity, or without impounding a sufficient part of the residuary estate for that purpose (k), for otherwise, if the contingent covenants, &c., should afterwards be broken, the

(d) Cro. Eliz. 466.

(e) Style, 37, 54, 73.

(f) Ambl. 160.

(g) 1 Alcock & Nap. 23.

(h) L. R. 10 Eq. 477. See also *Re Bewley's Estate*, 24 L. T. 177.

(i) See also *Knatchbull v. Fearnhead*, 3 M. & C. 122; *Newcastle Banking Co. v. Hymers*, 22 Beav. 367.

(j) See *Jervis v. Wolferstan*, L. R. 18 Eq. 18; *Whittaker v. Ker-shaw*, 45 C. D. 320; cf. *Re West*, [1909] 2 Ch. 180.

(k) *Simmons v. Bolland*, 3 Mer. 547; *Vernon v. Egmont*, 1 Bligh, N. S. 554; *Cochrane v. Robinson*, 11 Sim. 378; *Fletcher v. Stevenson*, 3 Hare, 360, 370; *Dobson v. Carpenter*, 12 Beav. 370; *Hickling v. Boyer*, 3 Mac. & G. 635; *Dean v. Allen*, 20 Beav. 1.

executor would be liable to answer the damages *de bonis propriis*, without any fault in him. But a decree or order of the Court directing the administration and application of the assets is of itself a complete and perfect indemnity to the executor, provided he keeps back nothing which ought to be disclosed to the Court (*l*).

Order of the Court a complete indemnity.

With regard to leasehold property the covenantee has no equity to apply to have a fund set apart for his indemnity (*m*). But it has been the practice of the Court, where the property comprised in the lease does not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which may in any reasonable probability arise by reason of a future breach. The effect, however, of setting apart a fund to answer future breaches of covenant is to throw a great burthen upon the residuary legatee which should not be inflicted upon him unless absolutely necessary (*n*). In *Re Nixon* (*o*), where in an administration action there had been advertisements for creditors, but no claim had been made in respect of liability under leases, which though formerly vested in the testator had not fallen to and become vested in the executors, so as to create privity of estate between them and the lessors, Byrne, J., said that in his opinion the authorities only show that it is necessary to set apart a fund for indemnity when there is privity of estate, and accordingly in that case he held that a fund ought not to be retained to the detriment of the beneficiaries under the Will. So too where there is a possible future claim for calls on shares the Court will order distribution of the estate without directing the retention of assets to meet the claim, and such order will completely exonerate the executors from all liability; but, *semble*, the order can only be made in proceedings in which administration is asked for (*p*).

As to liability under leases or shares.

By virtue of section 27 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), if the executor has sold the leaseholds and assigned

Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 27).

(*l*) *Dean v. Allen*, 20 Beav. 1. See *Smith v. Smith*, 1 Dr. & Sm. 384; *Dodson v. Sammell*, *ibid.* 575; *Waller v. Barrett*, 24 Beav. 413; *Bennett v. Lytton*, 2 J. & H. 155; *Addams v. Ferick*, 26 Beav. 384; *Williams v. Headland*, 4 Giff. 505; *England v. Tredegar*, L. R. 1 Eq. 344; *Re King*, *infra*.

(*m*) *King v. Malcott*, 9 Hare, 692.

(*n*) *Brewer v. Pocock*, 23 Beav. 210; *Smith v. Smith*, 1 Dr. & Sm. 384; *Dodson v. Sammell*, *ibid.* 575; referred to in *Hardy v. Fothergill*, 13 App. Cas. at p. 370.

(*o*) [1904] 1 Ch. 638. See *Re Sales*, [1920] W. N. 54.

(*p*) *Re King*, [1907] 1 Ch. 72.

them to a purchaser, he may without the order of the Court and of his own authority distribute the assets without making provision for future breach of covenant in the lease and shall not be subject to any liability (q). By that section it is enacted that "where an executor or administrator liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease, as may have accrued due, and been claimed, up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease: and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease and having, where necessary, set apart, such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the lease or agreement for a lease: but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." This section has been held to be retrospective (r).

The word "purchaser" in the above section means a person who buys a lease and pays for it in money. Accordingly an assignment by an executor of his testator's leasehold property to an assignee who is paid for taking over the lease and indemnifying the executor is not an assignment to a purchaser within the section, and consequently the executor ought to set aside a sum to meet future liabilities (s).

(q) *Dodson v. Sammell*, *ubi supra*.

(r) *Smith v. Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 De G. F. & J. 121.

(s) *Re Lawley*, [1911] 2 Ch. 530.

By section 28 similar provisions are made as to the liability of an executor in respect of covenants in conveyances or chief rent or rent-charge.

As to liability in respect of covenants in conveyances.

But it has always been held that an executor, who has assented unconditionally to a specific bequest of the testator's leasehold estates, is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases. Consequently, if the executors assign the leaseholds of the legatee (whether specific or residuary), they lose their right to an indemnity out of the general estate (*t*).¹

It may here be mentioned, that the old practice of the Court of Chancery was, that the legatee should in all cases give the executor security to refund, if debts should afterwards appear (*u*). Afterwards the Court ceased to require such security (*v*); and since then creditors have been allowed, in Courts of Equity, to follow assets in the hands of legatees, as well as of the executor (*w*).

Right of creditors to follow assets.

Another question arises, of great importance, and closely connected with the preceding inquiry, viz., whether, under any circumstances, an executor or administrator can be allowed payments made to legatees, or parties entitled in distribution, as against creditors of whose claims he had no notice.

Payment of legacies before debts of which an executor has no notice.

The question was discussed in the cases of *The Governors of the Chelsea Water Works v. Cowper* (*x*), *Norman v. Baldry* (*y*), *Smith v. Day* (*z*), *Knatchbull v. Fearnhead* (*a*), and *Hill v. Gomme* (*b*), and these authorities appear to demonstrate, that the mere circumstance of want of notice of a death or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he has *bonâ fide* handed over the assets to legatees or parties entitled

(*t*) *Shadbolt v. Woodfall*, 2 Coll. 30. See *Hickling v. Boyer*, 3 Mac. & G. 635, 646; *Smith v. Smith*, 1 Drew. & Sm. at p. 387.

(*u*) *Chamberlain v. Chamberlain*, 1 Chanc. Cas. 257; *March v. Russell*, 3 Mylne & Cr. 41, 42.

(*v*) *Anon.*, 1 Atk. 491.

(*w*) By Lord Hardwicke in *Hawkins v. Day*, Harg. MSS. Ambl. 804, Blunt's edit.; *March v. Russell*, 3 Mylne & Cr. 42; *post*, § x.

(*x*) 1 Esp. N. P. O. 275.

(*y*) 6 Sim. 621.

(*z*) 2 Mees. & W. 684.

(*a*) 3 Mylne & Cr. 122.

(*b*) 1 Beav. 540.

in distribution. But it seems to have been considered, in some cases, that lapse of time may operate as a waiver of the right of the creditor or claimant, by way of *laches* on his part, so as to preclude him from complaining of the insufficiency of the assets (*c*); and Tindal, C. J., in *Richards v. Brown* (*d*), says, that if, in the distribution of assets, a creditor does mislead an executor, either by *laches* or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*e*).

22 & 23 Vict.
c. 35, s. 29:
After notice
to send in
claims, &c.,
executor not
to be liable for
debts, after
distribution of
the assets, of
which he had
not then
notice.

The hardship on the executor has been much mitigated by stat. 22 & 23 Vict. c. 35, s. 29, which provides that "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate (*f*), such

(*c*) *Davis v. Blackwell*, 9 Bingh. 5.

(*d*) 3 Bingh. N. C. 493.

(*e*) See *Stroud v. Stroud*, 7 M. & Gr. 417, 421. But Tindal, C. J., does not, although he uses the term *laches*, mean that the mere doing nothing will deprive the creditor of his right to complain of a *devastavit*. There must be such a course of conduct or express authority whereby the executors have been misled into parting with assets available for payment of the creditor's claim: *Re Birch*, 27 C. D. 622; *Jewsbury v. Mummery*, L. R. 8 C. P. 60; *Richards v. Browne*, 3 Bingh. N. C. 493. And there is no rule in equity any more than in law that mere non-suing for any period within the time limited by the Statute of Limitations deprives a creditor of the right of requiring payment: *Re Baker*, 20 C. D. 230. See also *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, 210; and *Re Gallard*, [1897] 2 Q. B. 8.

(*f*) An executor who has distributed the assets of his testator after issuing advertisements and taking the steps pointed out by the Act, will have the same protection as if he had administered the estate under a decree of the Court, and if he should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trusts* he will no longer be under any liability *quâ* executor. See *Clegg v. Rowland*, L. R. 3 Eq. 368; *Hunter v. Young*, 4 Ex. Div. 256. But an executor with notice of a claim against his testator's estate is not discharged by the fact that the person entitled to make the claim has failed to send in particulars in answer to the statutory advertisements: *Re Land Credit Company of Ireland, Markwell's Case*, 21 W. R. 135.

The executors of a testator whose estate was liable to replace trust money in consequence of a breach of trust, having only issued notices for claims against the testator's estate to be sent in within three weeks, by advertisements in local newspapers in the neighbourhood where the testator resided and not in the *London Gazette*, was held by Lord Romilly, M. R., not to be protected from liability under the above section: *Wood v. Weightman*, L. R. 13 Eq. 434. It has, however, been

executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

In conclusion of this subject, it may be proper to consider how far the laches of the creditor may affect his priority over legatees, where there is a suit for the administration of testator's assets. Ord. LV. r. 44, of the R. S. C. provides that "where a judgment or order is given or made, whether in Court or in chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, shall be excluded from the benefit of the judgment or order."

How far a creditor's priority over legatees may be barred in a suit for the administration of assets.

Notwithstanding the language of this rule, and formerly the language of the judgment excluding those who do not come in from the benefit of the judgment or order in any action for the administration of an estate in Chancery, a creditor is as a rule allowed to come in after a certificate of debts has been made and share in the administration of any assets remaining undis-

held by North, J., in *Re Bracken*, 43 C. D. 1, that there is no absolute rule that notices issued by executors under the Act to creditors and others should (as was contended in that case) be published in a London daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of the section the Court will have regard to the circumstances of the particular case, such as the place of residence of the testator and his position in life.

The provisions of sect. 29 are not confined to claims of *creditors* of the testator or intestate, but apply also to persons having claims as *next of kin*: *Newton v. Sherry*, 1 C. P. D. 246.

See Ord. LV. rr. 44—61 (R. S. C. 1883) for the notices which would have to be given in an administration action.

tributed, but upon such terms as the Court thinks fit to impose (*g*). There is also a similar rule in bankruptcy which is applicable in the administration of an insolvent estate by virtue of sect. 10 of the Judicature Act, 1875.

Rule 57 of Ord. LV. however provides that "After the time fixed by the advertisement no claims shall be received (except as hereinbefore provided in case of an adjournment), unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit" (*h*).

If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred from the benefit of that judgment: If he chooses to sue the legatees and bring back the fund he may do so (*i*): but he cannot affect the legatees, except by suit; and he cannot affect the executor at all where the distribution has been under the order of the Court or after advertisement in pursuance of the statute; and consequently in either of these events the executor is not a proper party to any subsequent proceeding against the legatees (*k*).

A point of considerable difficulty arises if a creditor does

(*g*) See *per* Lord Eldon in *Gillespie v. Alexander*, 3 Russ. Chanc. Cas. 136; *March v. Russell*, 3 Mylne & Cr. 41; *Hartwell v. Colman*, 16 Beav. 140; and the observations of Lord Lyndhurst in *Vernon v. Egmont*, 1 Bligh, N. S. 570; also *Re McMurdo*, [1902] 2 Ch. 684; 71 L. J. Ch. 691; *Harrison v. Kirk*, [1904] A. C. 1.

(*h*) Under the old practice it would seem that, after report settled, though not signed, in a creditor's suit, a creditor could not be let in to prove his debt without a special application to the Court; and he must submit to be visited with costs and pay the usual penalty for default: *Parker v. Morley*, 3 Y. & C. 720. But see *Lee v. Flood*, 2 Sm. & G. 250.

(*i*). See *post*, Pt. III. Bk. III. Ch. IV. § x.; *David v. Frowd*, 1 M. & K. 209, 210; *Sawyer v. Birchmore*, 1 Keen, 401; 2 Mylne & Cr. 611; *March v. Russell*, 3 Mylne & Cr. 31; *Underwood v. Hatton*, 5 Beav. 36. Persons claiming as next of kin have similar rights to those established in favour of creditors by *David v. Frowd*, *ubi supra*. Where an intestate's estate had been distributed under a decree in an administration suit among persons found by the report to be his next of kin, it was held that a person claiming to be sole next of kin was not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin for the purpose of obtaining restitution of the fund so distributed. Acquiescence or laches may, however, disentitle such a person to maintain the action: *Mohan v. Broughton*, [1899] P. 211; and see *Williams v. Evans*, [1911] P. 175.

(*k*) *Gillespie v. Alexander*, 3 Russ. Chanc. Cas. 136, 137; *David v. Frowd*, 1 M. & K. 209, 210; *Seale v. Buller*, 2 Giff. 312; *Clegg v. Rowland*, L. R. 3 Eq. 368; *Hunter v. Young*, 4 Ex. D. 256.

not come in until some individual legatees have received their legacies in full under the sanction of the Court, and there are left in Court certain funds which have been directed to be appropriated to other individual legatees, who have not been paid: The question then is, whether a creditor, so coming in, is to be paid his whole debt by the unpaid legatees: or whether the rule is not, that he should take from them such a proportion only of his debt as would have been borne by them if he had applied before the other legacies were paid, and that he should be left to recover the residue of it against the paid legatees: In the case of *Gillespie v. Alexander* (l) (which was a suit for the administration of a testator's assets), after a decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt: The Master subsequently reported a debt to be due to him; but in the meantime the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees, who were infants: And Lord Eldon held, that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the Will; and that he must seek the payment of the rest of his debt, in proper proportions, amongst those legatees who had been actually paid (m).

In *Greig v. Somerville* (n), in a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then

(l) 3 Russ. Chanc. Cas. 130.

(m) See *David v. Frowd*, 1 M. & K. 210, by Sir J. Leach, M. R. Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts.

(n) 1 Russ. & M. 333.

an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account: In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in Court; and the plaintiff coming of age soon after, applied to have that sum paid out: And Lord Lyndhurst held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in Court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff (o).

The rule applied in *Gillespie v. Alexander* and *Greig v. Somerville* is not, however, applicable where the estate has not been administered by the Court (p).

SECTION II.

Abatement of Legacies.

In case of
deficiency of
assets, general
legatees must
abate before
specific :

1. As to the abatement of general legacies. In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

(o) The general rule then being that mere delay does not prevent a creditor coming in to prove while there are assets in hand: *Brown v. Lake*, 1 De G. & Sm. 144. The question in each case seems to be whether there is anything to take it out of the general rule. Thus in *Cattell v. Simons*, 8 Beav. 243, a bond creditor had proved his debt and also claimed to have an equitable mortgage for the amount. The matter having stood over for amendment by the creditor and he, through his neglect to amend, being reported as a bond creditor only, the estate was sold, the money paid into Court, and an apportionment directed. Nine years afterwards his personal representative presented a petition for liberty to go in and establish his mortgage, alleging that he had recently discovered that the amendment had not been made; it was dismissed with costs. On the other hand, in *Re Metcalfe*, 13 C. D. 236, a creditor who had obtained an order for raising the amount which he then claimed out of a testator's realty, was afterwards allowed, the assets being undistributed, to obtain an order by way of amendment, increasing the amount to be raised, although he had in his possession, at the time of obtaining the first order, a book which, if he had known of the existence of a particular entry, would have supplied the information on which the claim to amend was based. Cf. also, *Re McMurdo*, [1902] 2 Ch. 684.

(p) *Davies v. Nicolson*, 2 De G. & J. 693.

This abatement must take place among all the general legatees in equal proportions (*q*): And the executor has no power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (*r*).

Generally speaking, nothing shall, in such cases, be abated from the specific legacies (*s*). But if the testator bequeaths specific legacies, and also general pecuniary legacies, and directs by his Will that such pecuniary legacies shall come out of all his personal estate, or words tantamount; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory (*t*).

It must here be observed, that a *residuary* legatee has no right to call upon particular general legatees to abate: The whole personal estate not specifically bequeathed must be exhausted, before those legatees can be obliged to contribute anything out of their bequests (*u*).

but a
residuary
legatee cannot
call on them
to abate.

So if there is a simple bequest of an annuity, there is no doubt but that, however great or small the income of the testator's property may be, the annuity must be paid in full to the last farthing of the property (*x*). But the provisions of the Will as to the payment of the annuity may be such as to show an intention, on the part of the testator, that the annuity shall only come out of the income of the fund or estate, and not out of the *corpus* or capital. The general rule is, that if there be a clear gift of a life interest and a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest: But if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee (*y*).

(*q*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5. With regard to general legacies of stock, the abatement will be regulated by the value of stock at the end of one year next after the testator's death: *Blackshaw v. Rogers*, cited *per curiam* in *Simmons v. Vallance*, 4 Bro. O. C. 349. *Auther v. Auther*, 13 Sim. 440, *per* Shadwell, V.-C.

(*r*) Toller, 347.

(*s*) Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5; *Clifton v. Burt*, 1 P. Wms. 676; 2 Black. Com. 513; Toller, 339.

(*t*) *Sayer v. Sayer*, Prec. Chanc. 393; Treat. Eq. Bk. 4, Pt. 1, ch. 2, s. 5.

(*u*) *Purse v. Snaplin*, 1 Atk. 418; *Fonnereau v. Poyntz*, 1 Bro. C. C. 478. See *Harley v. Moon*, 1 Dr. & Sm. 623; *Baker v. Farmer*, L. R. 3 Ch. 537.

(*x*) *Croly v. Weld*, 3 De G. M. & G. 993, 996, by Knight Bruce, V.-C.

(*y*) *Ibid.* 995, by Lord Justice Turner; *post*, p. 1089, n. (*a*). The

In *Farmer v. Mills* (z), a testator, by his Will, bequeathed certain annuities, and directed that sums set apart to secure them, should, as the annuitant died, sink into the residue of his personal estate: By a codicil to his Will, he stated, that in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: And it was held by Sir

following are cases in which annuities have been held payable out of the *corpus* or capital of the testator's estate: *Miller v. Huddleston*, 17 Sim. 71; *Haynes v. Haynes*, 3 D. M. & G. 590; *Croly v. Weld*, *ibid.* 993; *Miner v. Baldwin*, 1 Sm. & G. 522; *Hickman v. Upsall*, 2 Giff. 124; *Howarth v. Rothwell*, 30 Beav. 516, where the earlier cases are given; *Bright v. Larcher*, 3 De G. & J. 48; *Upton v. Vanner*, 1 Dr. & Sm. 594; *Phillips v. Gutteridge*, 32 L. J. Ch. 1; *Birch v. Sherratt*, L. R. 2 Ch. 644; *Pearson v. Helliwell*, L. R. 18 Eq. 411; *Re Hedges' Trust*, L. R. 18 Eq. 419; *Michell v. Wilton*, L. R. 20 Eq. 269; *Re Mason*, 8 C. D. 411; *Carmichael v. Gee*, 5 App. Cas. 588; *Re Tucker*, [1893] 2 Ch. 323. The following are cases in which they were held payable out of *income*: *Tarbottom v. Earle*, 11 W. R. 680; *Bague v. Dumergue*, 10 Hare, 462; *Hindle v. Taylor*, 20 Beav. 109; *Baker v. Baker*, 6 H. L. C. 616 (reversing *S. C.*, 20 Beav. 548; 7 De G. M. & G. 681); *Stelfox v. Sugden*, Johns. 234; *Booth v. Coulton*, L. R. 5 Ch. 684; *Wormald v. Muzeen*, 45 L. T. 115; 50 L. J. Ch. 776; *Re Boden*, [1907] 1 Ch. 132. The question may generally be put in the terms used by Lord Gifford in *May v. Bennett*, 1 Russ. 370, viz., whether the bequest is to be considered as a bequest of an annuity or as the bequest of the income (or part of the income) of a sum directed to be set apart. The case of *Wright v. Callender*, 2 De G. M. & G. 652, is an instance of the former class; *Baker v. Baker*, *ubi supra*, is an instance of the latter. If the gift is of an annuity not so limited as to make it payable exclusively out of the income of a particular fund during the annuitant's lifetime, it will be a charge on the *corpus* to the loss of those interested in the residuary estate. If, on the other hand, what is bequeathed is the income of a particular fund, then, if the income does not come up to the expectation of the testator, the annuitant will have to bear the loss: *Carmichael v. Gee*, 5 App. Cas. 588, 597, in which case Lord Selborne says that *Miller v. Huddleston*, L. R. 6 Eq. 65, if rightly decided, depended on the special language of a very special Will. The mere fact that the gift of an annuity is followed by a direction to set apart a fund to secure it, will not cut down the right of an annuitant to a right to receive only the income of fund: *Re Mason*, 8 C. D. 411. A provision that the fund out of which the annuity is directed to be paid shall fall into the residue after the death of the annuitant, is an indication that the testator meant to bequeath an *annuity*: *May v. Bennett*, *ubi supra*; *Wright v. Callender*, *ubi supra*; *Re Cottrell*, [1910] 1 Ch. 402; *Re Richardson*, [1915] 1 Ch. 353. A provision for the destination of the surplus income during the life of the annuitant goes to show that the annuity is a charge on the income only: *Wormald v. Muzeen*, 45 L. T. 115; 50 L. J. Ch. 776; 29 W. R. 795, reversing *S. C.*, 17 C. D. 167; *Stelfox v. Sugden*, Johns. 234, 240. Where there is a trust to pay an annuity out of income and subject thereto upon certain trusts over, the annuity is a charge on the *corpus*: *Re Howarth*, [1909] 2 Ch. 19; *Re Watkins*, [1911] 1 Ch. 1; *Re Young*, [1912] 2 Ch. 479. *Re Bigge*, [1907] 1 Ch. 714, is overruled, see *Re Watkins*, *supra*.

(z) 4 Russ. 86.

John Leach, M. R., that upon the death of any annuitant, the sum, set apart to secure the reduced annuity, would belong to the residuary legatees, and was not to be applied to increase the reduced annuities to the amount given by the Will: His Honour, however, observed, that if the case had rested upon the Will, the residuary legatees could have taken no benefit, until the annuities were fully provided for (a).

In *Arnold v. Arnold* (b), a testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees: He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue: The testator's estate was not sufficient to pay the legacies in full: And Sir C. Pepys, M. R., held, that upon the death of one of the tenants for life an' apportionment of the legacy of 800*l.*, set apart to answer her

(a) In *Scott v. Salmond*, 1 M. & K. 363, a testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants: The fund having proved deficient, and the annuitants having suffered a proportional abatement, it was held by Sir J. Leach, M. R., and afterwards by Lord Brougham, on appeal, that on the death of one of them, the income from the fund released by the falling in of her annuity went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities. See also *Page v. Leapingwell*, 18 Ves. 463; *Miller v. Huddleston*, L. R. 6 Eq. 65; *Re Lyne's Estate*, L. R. 8 Eq. 482; *Re Tootal's Estate*, 2 C. D. 628. See also *Wright v. Weston*, 26 Beav. 429. But where a testator, having a power of appointment by Will over a sum of stock, bequeathed two sums of 5,000*l.* and 500*l.* sterling thereof to A. and B., and the residue to his son; and the stock became in Equity liable to his debts, and by payment thereof, and of the costs of the suit, the fund became less than 5,500*l.* sterling, it was held by Romilly, M. R., that the pecuniary and residuary legatees were not liable to abate proportionally, but that the residuary gift failed altogether: *Petre v. Petre*, 14 Beav. 971. See also *Harley v. Moon*, 1 Drew. & Sm. 623. The question would seem to be, does the testator deal with a given sum which he assumes to be available, or does he not? If a man dealing with a sum of stock or a specific amount says, "I bequeath so much to A., so much to B., and the rest to C.," the fund must be divided in those exact proportions, and if the stock falls short the loss must be apportioned amongst all the legatees in the same proportion: but if the testator is not dealing with a specific amount, or does not assume to be so doing, the loss will fall on the residuary legatee: *Elwes v. Causton*, 30 Beav. 554; *De Lisle v. Hodges*, L. R. 17 Eq. 440.

(b) 2 M. & K. 374; followed in *Re Richardson*, [1915] 1 Ch. 353.

life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund: And his Honour observed, on *Farmer v. Mills*(c) being cited, that in that case the testator's codicil expressly provided that the annuities should be rateably reduced; and that, but for that codicil, the residuary legatees could have taken no benefit until the annuities were fully paid.

Rights of
residuary
legatee in case
of deficiency
through
devastavit of
executor.

A point of considerable difficulty arises in cases where there are pecuniary legatees and a residuary legatee, and *by reason of the devastavit of the executor* the estate becomes insufficient to pay all the pecuniary legacies: The question then is, whether, there being at the testator's death a residue of a certain sum, the residuary legatee is not entitled to rank as a legatee of that sum.

In *Dyose v. Dyose* (d), Lord Cowper, in the instance of deficiency by a *devastavit*, held, that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate, which could be recovered after the *devastavit*, was divisible, not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

But this decision came under the consideration of Lord Thurlow, in the cases of *Fonereau v. Poyntz* (e), and *Humphreys v. Humphreys* (f); on both which occasions his lordship condemned the doctrine of it: And this condemnation was approved by Sir William Grant in *Page v. Leapingwell* (g).

On the other hand, in *Ex parte Chadwin* (h), Lord Eldon, after reviewing all the preceding authorities, seems to consider the question as unsettled: and his decree in that case may, perhaps, be considered as in some measure confirmatory of *Dyose v. Dyose*, though certainly on a totally different principle. But in *Baker v. Farmer* (i), Sir W. Page Wood, L. J., observed that *Dyose v. Dyose* cannot be relied on, after the observations which have been made upon it by subsequent judges, to prove that a

(c) *Ante*, p. 1088.

(e) 1 Bro. C. C. 478.

(g) 18 Ves. 436.

(d) 1 P. Wms. 305.

(f) 2 Cox, 186.

(h) 3 Swanst. 337.

(i) L. R. 3 Ch. 537.

residuary legatee can be allowed to come in *pari passu* with other legatees in case of a deficiency of assets.

The case above mentioned, of *Ex parte Chadwin* (*j*), is an authority to show that a legatee, entitled to a priority, may have so dealt, in respect to his legacy, with an executor guilty of a *devastavit*, as to lose all priority, and to render it just, that the estate should be divided as if no *devastavit* had taken place: There the testator directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W. C., and upon further trust, out of the residue of the money, to invest 400*l.* in trust for J. R. for life, and after his death for his children; and upon further trust, to pay other sums to persons named; and he bequeathed the residue of his estate to W. C.: The only acting executor made no investment on the trust of the Will, but paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards became bankrupt: Lord Eldon was of opinion, that, by so dealing with the executor, these two legatees had made him their debtor for their legacies respectively: And upon that ground his lordship decreed, that the dividends payable upon the whole sum proved under the commission against the executor in respect of the testator's estate should be divided among the pecuniary and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each.

In *Willmott v. Jenkins* (*k*), an executor, who was also trustee, divided the assets: He paid to the adult legatees their shares, and invested the shares of the infants in his own name, but he executed no declaration of trust thereof: He afterwards applied these sums to his own use: Further assets having unexpectedly fallen in, Lord Langdale, M. R., held that they ought, in the first place, to be applied in making good the infants' legacies: And the learned Judge said, that if an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated (*l*); but that if there be no payment,

(*j*) 3 Swanst. 380.

(*k*) 1 Beav. 401.

(*l*) See *Morris v. Livie*, 1 Y. & Coll. Ch. C. 380, *post*, pp. 1133, 1135.

and no appropriation equivalent to payment, his Lordship did not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees (*m*).

Priority
among
general
legatees, of
purchasers
over volun-
teers:

The general rule is, that, among legacies in their nature general (according to the distinctions attempted to be pointed out in a previous chapter) there is no preference of payment: they all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee (*n*) or of the relinquishment of any right or interest, as of her dower by a widow (*o*), such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties (*p*); and it would seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee (*q*). But it is requisite that the right or interest should be subsisting at the testator's death (*r*).

In *Heath v. Dendy* (*s*), the testator, having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific

For the purpose of abatement the capital sum required to satisfy a contingent legacy must be ascertained on the basis of investment in Consols: *Re Hollins*, [1918] 1 Ch. 503.

(*m*) Where there has been no consent of the legatees to the special appropriation of the fund out of which their legacies are payable, the ordinary rule that the residuary legatee can take nothing till all the pecuniary legatees have been paid must prevail: *Baker v. Farmer*, L. R. 3 Ch. 537 (reversing *Malins, V.-C.*, L. R. 4 Eq. 382); *Harley v. Moon*, 1 Dr. & Sm. 623.

(*n*) But see *Re Wedmore*, [1907] 2 Ch. 277, observed upon in *Re Whitehead*, [1913] 2 Ch. 56.

(*o*) *Burridge v. Bradyl*, 1 P. Wms. 127; *Heath v. Dendy*, 1 Russ. Ch. O. 543; *Norcott v. Gordon*, 14 Sim. 258. But such a legacy has no priority, where the testator leaves no real estate out of which the widow is dowerable: *Acey v. Simpson*, 5 Beav. 35; or where the only real estate of the testator was conveyed to him with a declaration against dower: *Roper v. Roper*, 3 C. D. 714. The decision of *Malins, V.-C.*, in this case was subsequently approved by *Chitty, J.*, in *Re Greenwood*, [1892] 2 Ch. 295, 299, although he dissented from the dictum of the Vice-Chancellor that, if the dower had been barred by the Will, the widow would have been entitled to priority.

(*p*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5.

(*q*) Ambl. 244.

(*r*) *Blower v. Morret*, 2 Ves. Sen. 422.

(*s*) 1 Russ. 543.

legacies, and also a general legacy, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim: The assets proved insufficient for the payment of the legacies in full: And Lord Gifford, M. R., held, that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies: His Lordship, in giving judgment, observed, that if, at the death of the testator, his widow had not been entitled to dower, then, according to the principle of the previous authorities, she could not have claimed any priority: But, at his death, her right to dower was in full force; and she was to release her dower, not merely for the provision which the settlement made, but for that provision taken in conjunction with the legacy: It was not material whether the sum bequeathed was or was not the whole of the consideration for the release of the dower: If it was only part of the consideration, she was nevertheless a purchaser of the sum, and was entitled to priority over the other legatees (t).

In *Davies v. Bush* (u), a testator had bequeathed a legacy to a person, between whom and himself accounts had subsisted for some time, on condition of his executing to the testator's executors a general release of all claims and demands which the legatee had on the testator: The legatee executed the release: The assets were insufficient for the payment of all the legacies; and the question was, whether this particular legatee was, by the execution of the release, a purchaser of his legacy, and entitled to be paid in preference to the other legatees; or whether he was bound to abate rateably with them: It did not appear whether the legatee had any legal claim or demand on the testator: Lord Lyndhurst, C. B., was of opinion, that if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees: If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee could not be treated as a purchaser. So a

(t) It is enacted by stat. 3 & 4 Will. IV. c. 105 (Act for the amendment of the Law relating to Dower), s. 12, that nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. See *Re Greenwood*, [1892] 2 Ch. 295.

(u) 1 Younge, 341, explained in *Re Whitehead*, *infra*.

legacy given on condition that the legatee releases an annuity, under a prior settlement has no priority and must abate (*v*).

A legacy given in satisfaction of an ascertained debt is liable to abate, but the forgiveness of a debt amounts to a specific legacy and will not abate with the general legacies (*w*).

General legacies, bequeathed to creditors, whose debts have been previously liquidated by composition at less than their real amounts, are merely voluntary, and therefore not exempt from abatement together with other general legacies upon a deficiency of assets (*x*). So where the testator bequeaths money to pay the debts of a relation or friend, such legacies must be considered as bounties, and in no better condition than other general legacies (*y*).

instances
where priority
among
general
legatees is not
allowable:

It must here be observed, that a legacy, which is, in its nature, general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose: Thus legacies of a certain sum each to executors for their care and trouble (*z*), or of profit costs to a solicitor trustee (*a*), or of sums of money for mourning rings (*b*), or to servants (*c*), or to charities (*d*), are not to be preferred to other general legacies. And although the bequest is made in favour of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies (*e*).

(*v*) *Re Whitehead*, [1913] 2 Ch. 56.

(*w*) *Re Wedmore*, [1907] 2 Ch. 277.

(*x*) *Coppin v. Coppin*, 2 P. Wms. 296. See *Turner v. Martin*, 7 De G. M. & G. 429, *ante*, p. 960, note (*q*). See, however, *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, 451, for a discussion of the circumstances under which the compromise of a disputed claim is a good consideration for a promise; and compare with that case, *Ex parte Banner*, 17 C. D. 480, 490; and *Miles v. New Zealand Alford Estate Co.*, 32 C. D. 266; *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309.

(*y*) *Shirt v. Westby*, 16 Ves. 396.

(*z*) *Duncan v. Watts*, 16 Beav. 204. See also *Re White*, [1898] 2 Ch. 217.

(*a*) *Re Brown*, [1918] W. N. 118; *O'Higgins v. Walsh*, [1918] 1 Ir. R. 126.

(*b*) *Apreece v. Apreece*, 1 Ves. & Beam. 364. In *Masters v. Masters*, 1 P. Wms. 423, Lord Parker exempted a legacy of a certain sum for building a monument to the memory of a relation from abating with the general legacies; but this decision has been doubted on strong grounds: See *Blackshaw v. Rogers*, cited 4 Bro. C. C. 349.

(*c*) *Att.-Gen. v. Robins*, 2 P. Wms. 25.

(*d*) *Att.-Gen. v. Hudson*, 1 P. Wms. 675; *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 566; *Re Brown*, *supra*.

(*e*) *Blower v. Morret*, 2 Ves. Sen. 420. Unless from the construction

Again, an annuity charged on the personal estate is a general legacy (*f*). And, therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate proportionably. And whether an annuity is to commence immediately on the death of the testator or at a future period, this principle will equally apply (*g*). And if annuities abate with reference to other legacies, they must, of course, abate between themselves. In *Innes v. Mitchell* (*h*), a testator had bequeathed an annuity of 300*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor of the sum set apart to answer the annuity: After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, became available: And it was held, that the annuity must be supposed to have continued until it was put an end to by the principal money falling in; and that such money must be apportioned rateably between the arrears which would, on that supposition, be due to the daughters respectively, and the sum originally set apart, and which belonged to the last survivor (*i*).

annuity charged on personal estate is a general legacy.

of the Will it appears that the testator has shown intention to give priority to a particular legacy: *Re Hardy*, 17 C. D. 798. In the case of *Re Hardy*, Malins, V.-C., seems to have said, "*Blower v. Morret* is in my opinion distinguishable in many respects, but if it is not, then I say I dissent from it and decline to follow it." In the case of *Re Schweder's Estate*, [1891] 3 Ch. 44, Chitty, J. said, "In my opinion *Re Hardy* was not distinguishable from *Blower v. Morret*, and with all due respect to the learned Vice-Chancellor (who decided it) he was bound by it. I think I am constrained by *Blower v. Morret*, and by the continued course of the authorities since that decision, to dissent from *Re Hardy*, as I do."

(*f*) *Innes v. Mitchell*, 1 Phil. Ch. C. 716, per Lord Lyndhurst; 11 Cl. & F. 508, per Lord Cottenham; *Miller v. Huddleston*, 3 Mac. & G. 513. But if annuities are given as specific gifts of interest in the real estate, they shall not abate with legacies charged generally on the real estate: *Creed v. Creed*, 11 Cl. & F. 491 (overruling the decision of Sugden, C., of Ireland, 1 Dr. & W. 416).

(*g*) *Innes v. Mitchell*, 1 Phil. Ch. C. 716.

(*h*) 2 Phil. Ch. C. 346, reversing in part the decision 1 Phil. Ch. C. 710.

(*i*) See also *Todd v. Bielby*, 27 Beav. 353, as to the proper mode of ascertaining the value of the annuities, in a case where several annuities are given, and the fund proves deficient, and some of the annuitants are dead and some are living: *Heath v. Nugent*, 29 Beav. 226. See also *Potts v. Smith*, L. R. 8 Eq. 683; *Re Wilkins*, 27 C. D. 703; *Re Metcalf*, [1903] 2 Ch. 424. As to the period at which the value must be taken, see *Fielding v. Preston*, 1 De G. & J. 438.

Where deficient estate is being administered by the Court the annuity is valued and the amount subject to abatement paid at once to the annuitant.

Where the deficient estate is being administered under an order of the Court, but not otherwise (*j*), the annuity ought to be valued, and the annuitant will be entitled at once to the amount of the valuation subject to an abatement in proportion to the abatement of the pecuniary legacies (*k*), notwithstanding the annuity itself was payable for life or until the annuitant should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person (*l*). In *Re Ross* (*m*), where the annuitant was a married woman restrained from anticipation, and was entitled as from the death of the testator to a dividend in proportion to the capitalized value of the annuity, the Court for convenience directed the purchase of a Government annuity on the life of the annuitant with such capitalized value; she died after the amount was fixed but before the annuity was actually purchased, and it was held that her surviving husband, as her representative, was entitled to receive the capital.

Instances where priority among general legatees is allowable.

But if by the express words or fair construction of the Will, the intent of the testator is clearly manifest to give one general legatee a priority to the others, that intention must be carried into effect (*n*): as where the testator gave legacies to his two sons and his daughter, with a proviso, that if the assets should fall short for the satisfaction of those legacies, his daughter notwithstanding should be paid her full legacy, and the abatement be borne proportionally by the legacies of the sons only (*o*). So where the testator, after giving various legacies, expressed at the end of his Will his apprehension that there would be a considerable surplus of his personal estate, beyond what he had before given away in legacies, for which reason he gave several

(*j*) *Re Nicolson's Estate*, I. R. 11 Eq. 177, on a sale of lands charged with an annuity an order was made that the annuitant should be at liberty to apply from time to time to have the annuity paid in the first instance out of the dividends of stock set apart to provide for the annuity, and any deficiency of dividends provided for by sale of the stock: approved in *Re Owen's Estate*, [1900] 1 I. R. 151, 161.

(*k*) *Wroughton v. Colquhorne*, 1 De G. & Sm. 357; *Carr v. Ingleby*, *ibid.* 362, note; *Long v. Hughes*, *ibid.* 364.

(*l*) *Re Sinclair*, [1897] 1 Ch. 921, not following *Carr v. Ingleby*, *ubi supra*, on this point, and distinguishing *Gratrix v. Chambers*, 2 Giff. 321. *Carr v. Ingleby* was followed and *Re Sinclair* was distinguished in *Re Richardson*, [1915] 1 Ir. R. 39, and *Re Dempster*, [1915] 1 Ch. 795.

(*m*) [1900] 1 Ch. 162.

(*n*) *Lewin v. Lewin*, 2 Ves. Sen. 415; *Re Hardy*, 17 C. D. 798, 803; *Re Backhouse*, [1916] 1 Ch. 65.

(*o*) *Marsh v. Evans*, 1 P. Wms. 668.

further legacies; and afterwards, by a codicil, he gave several other legacies; it was decreed, that the subsequent legacies given by the Will, having been given on a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies at the end of the Will should be lost; and also, that the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil: and therefore, unless the inference could be repelled, the legacies given by the codicil must be lost also (*p*). Again, where a testator gave 1,000*l.* to trustees upon trust to pay the interest to his wife, during her life, and after her decease he declared his will to be, that the 1,000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his Will; and he gave a legacy of 500*l.*, in trust for N. M. and his wife, in nearly the same words; it was held, that a priority was given to these two legacies (*q*).

But the *onus* lies on the party seeking priority, to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive (*r*). The reason of it is, that the testator, in the absence of plain proof to the contrary, must be deemed to have considered that his estate would be sufficient to answer the purposes to which he has devoted it, and consequently not to have thought it necessary to provide against a deficiency, by giving a priority, in case of a deficiency, to some of the objects of his bounty. Therefore where the expressions are ambiguous, and do not mark with certainty the testator's intention, no priority can be allowed: Thus it is not sufficient that the testator gives a direction as to a general legacy to his wife, that it shall be paid *immediately* after his death, out of the

(*p*) *Att.-Gen. v. Robins*, 2 P. Wms. 23. See also *Stammers v. Halliley*, 12 Sim. 42; *Re Backhouse*, [1916] 1 Ch. 65.

(*q*) *Brown v. Brown*, 1 Keen, 275. There would seem to be no presumption of an intention to give priority to a wife or children before strangers, notwithstanding the observations of Malins, V.-C., in *Re Hardy*, 17 C. D. 798, as the learned Vice-Chancellor himself recognizes in *Roper v. Roper*, 3 C. D. 714, 720. See also *Re Schweder's Estate*, [1891] 3 Ch. 44, *ante*, p. 1095, note (*e*). See, for further examples of preference of general legatees in payment, in consequence of the intention of the testator, not expressed in terms, but sufficiently apparent from the whole contents of the Will, *Lewin v. Lewin*, 2 Ves. Sen. 415; *Beeston v. Booth*, 4 Madd. 161, 170; *Pepper v. Bloomfield*, 3 Dr. & W. 499; *Haynes v. Haynes*, 3 Do G. M. & G. 590; *Gyett v. Williams*, 2 Johns. & H. 429.

(*r*) *Miller v. Huddleston*, 3 Mac. & G. 523, by Lord Truro.

first money that shall be received by the executors (s). So if the words are "*Imprimis*," or "in the first place, I give 1,000*l.* to A.," this will not give a priority to other general legatees (t). In the case of *Beeston v. Booth* (u), the testator gave his personal estate to executors, in the first place, to pay debts, funeral and testamentary expenses; and in the next place, three legacies to B., C., and D., with legal interest from three months after his death; and afterwards to raise and set apart three sums of money to be applied as therein mentioned: Upon a question of abatement, the Court declared, upon the principle before stated, that none of the legacies were entitled to a priority of payment, and, therefore, that all of them must abate proportionally, according to the general rule (v).

Legacies free
of duty.

Where legacies are given "free from duty" and the estate is insufficient, the duty on each legacy is to be regarded as an additional legacy, and added to the original legacy, and then both legacies must abate rateably (x).

Legacies in
the nature of
specific
legacies.

It is necessary here to refer to the class of legacies alluded to in a previous section (y), as being in the nature of specific legacies, and sometimes called demonstrative legacies, viz., bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself: those legatees have such a lien upon the specific fund referred to that they will not be obliged to abate with general legatees: And in this, as in the preceding cases, the testator's intention is the principle: for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended

(s) *Blower v. Morret*, 2 Ves. Sen. 420; *Re Schweder's Estate*, [1891] 3 Ch. 44, in which Chitty, J., dissented from the decision of Malins, V.-C., in *Re Hardy*, 17 C. D. 798, on the ground that the Vice-Chancellor was bound by the decision of Lord Chancellor Hardwicke in *Blower v. Morret*, which decision, until it came before the Vice-Chancellor, had never been questioned by anyone.

(t) *Brown v. Allen*, 1 Vern. 31.

(u) 4 Madd. 161.

(v) See also *Thwaites v. Foreman*, 1 Coll. 409; *Creed v. Creed*, 1 Dr. & W. 416; 11 Cl. & F. 491; *Ashburnham v. Ashburnham*, 16 Sim. 186; *Miller v. Huddleston*, 17 Sim. 71; 3 Mac. & G. 513; *Lord Dunboyne v. Brander*, 18 Beav. 313; *Evestaff v. Austin*, 19 Beav. 591; *Haynes v. Haynes*, 3 De G. M. & G. 591; *Coore v. Todd*, 23 Beav. 92; 7 De G. M. & G. 520; *Wright v. Weston*, 26 Beav. 429; *Haslewood v. Green*, 28 Beav. 1; *Elwes v. Causton*, 30 Beav. 554; *Re Harris*, [1912] 2 Ch. 241.

(x) *Re Turnbull*, [1905] 1 Ch. 726.

(y) *Ante*, p. 917.

those legacies as a preference to others which he had not so secured (z).

It has appeared, that as long as any of the assets, not specifically bequeathed, remain, such as are specifically bequeathed are not to be applied in payment of debts (a); although to the complete disappointment of the general legacies: But when the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies (b). So a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees (c).

Of the abatement of specific legacies.

An important inquiry, connected with this subject, sometimes occurs; viz., under what circumstances the specific legatees of chattels can compel the devisees of the real estate of the testator to contribute to the satisfaction of his debts, in case the general personal estate proves insufficient for that purpose. But it will be more convenient to consider this question hereafter, together with the subject of the exoneration of real estate (d) and the doctrine of marshalling assets (e).

SECTION III.

Executor's Assent to a Legacy.

The whole real and personal property of the testator, as has appeared in a former part of this Work, devolves upon his executor (f). It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the

Necessity of executor's assent to complete the title of legatee.

(z) *Roberts v. Pocock*, 4 Ves. 150; *Lambert v. Lambert*, 11 Ves. 607; *Robinson v. Geldard*, 3 M. & G. 735, 745, per Lord Truro; *Acton v. Acton*, 1 Meriv. 178; *Creed v. Creed*, 11 Ol. & F. 491, 509, per Lord Cottenham; *Tempest v. Tempest*, 2 K. & J. 635; affd. 26 L. J. Ch. 501.

(a) Or of costs, when a suit has been instituted: *Barton v. Cooke*, 5 Ves. 464. But see *Newbegin v. Bell*, 23 Beav. 386; *Re M'Morreu*, [1917] 1 Ir. R. 278.

(b) *Sleech v. Thorington*, 2 Ves. Sen. 561, 564; *Clifton v. Burt*, 1 P. Wms. 680; *Duke of Devon v. Atkins*, 2 P. Wms. 382, 383; 2 Fonbl. Treat. Eq. B. 4, Pt. 1, ch. 2. s. 5, note (q). See *Fielding v. Preston*, 1 De G. & J. 438.

(c) *Roberts v. Pocock*, 4 Ves. 160.

(d) *Post*, Pt. iv. Bk. i. Ch. ii. § 1.

(e) *Ibid.* § 11.

(f) *Ante*, p. 494.

extent of the whole estate, without regard to the testator having by his Will directed that a portion of it shall be applied to other purposes (*g*). Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (*h*).

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his Will, expressly direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken in fraud of his creditors (*i*).

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered (*k*).

Legacy of
forgiveness
of debt.

Again, if the testator by Will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention; for although on the one hand, it may be alleged that the party, to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent, as where there is to be a transfer of the property: yet, on the other hand, a debt so forgiven is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of debts: But as soon as the executor assents, and not before, it shall be effectually discharged (*l*).

(*g*) *Ante*, p. 1077.

(*h*) Swinb. Pt. 1, § 6, pl. 5, s. 7, pl. 1; 1 Saund. 427, note (5) to *Duppa v. Mayo*.

(*i*) Wentw. Off. Ex. 409, 14th edit.

(*k*) Wentw. Off. Ex. 69, 14th edit.

(*l*) Wentw. Off. Ex. 72, 14th edit. A debt so forgiven is subject to the rules which affect all legacies: *Re Wedmore*, [1907] 2 Ch. 277; and is liable to legacy duty: *Att.-Gen. v. Holbrook*, 12 Price, 407; it may be adeemed: *Rider v. Wager*, 2 P. Wms. 332; it will lapse by the death of the debtor in the lifetime of the testator: *Toplis v. Baker*, 2 Cox, 118; *Elliott v. Davenport*, 1 P. Wms. 83; *Maitland v. Adair*, 3 Ves. 231; *Izon v. Butler*, 2 Price, 34; unless an intention "specifically penned" is shown to release the debt whether the debtor survives or not: *Sibthorp v. Moxon*, 3 Atk. 579; *South v. Williams*, 12 Sim. 566.

Until modern times, it appears to have been the practice of the Bank of England, with respect to government stock or annuities, grounded upon the statute 5 W. & M. c. 20, by which the Bank was instituted, and upon the other Acts of Parliament which regulate the devise of property transferable at the Bank (by which the probates of Wills are directed to be there deposited for the purpose of having the trusts extracted), in cases where stock, &c. has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees, and not to the executor; and when trustees have been appointed, then to the trustees, with a restriction not to allow of a transfer to any other persons, except those named in the Will: It seems, however, to be now clear, that this practice is erroneous, and that the executor, having the legal right to the specific as well as to the general assets, to pay debts, &c., has the sole right to call upon the Bank to transfer the stock into his name: as no interest in it vests in the legatees prior to his assent (*m*). It also appears to be immaterial whether such property be given specifically in the strict sense of the word, or as residue; since such property is to be considered for this purpose as on the same footing as the other general assets, and therefore subject to all the incidents of a testamentary disposition of personal estate (*n*). And now, by stat. 33 & 34 Vict. c. 71, s. 23, it is expressly enacted, that all stock, standing in the name of any deceased person, shall and may be assigned and transferred by the executors or administrators of the deceased, notwithstanding any specific bequest thereof (*o*).

It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him: So although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it (*p*).

(*m*) See *ante*, pp. 626, 627. *Humberstone v. Chase*, 2 Younge & C. 209.

(*n*) 1 Rep. Leg. 732, 3rd edit.

(*o*) See *ante*, p. 627.

(*p*) *Mead v. Orrery*, 3 Atk. 239; Wentw. Off. Ex. 409, 14th edit.; Com. Dig. Admon. (C. 5); Bac. Abr. Exors. (L.) 3.

If an executor refuse his assent without cause, he may be compelled to give it, by a Court of Equity (*q*).

Land Transfer Act, 1897: assent to a devise of real estate.

With regard to the real estate, which under sect. 1 (1) of the Land Transfer Act, 1897, vests in the personal representative, by sect. 2 (1) of that Act the persons by law beneficially entitled thereto have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate; and by subsect. (2) (as amended by Conveyancing Act, 1911, s. 12) all enactments and rules of law as respects matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them, and sect. 3 (1) provides that "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance" (*r*).

Sect. 3 (2) of the Land Transfer Act, 1897, provides that "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

What shall constitute an assent.

With respect to what shall constitute such assent on the part

(*q*) Com. Dig. Admon. (C. 8); *Martin v. Wilson*, [1913] 1 Ir. R. 470.
 (*r*) For the provisions of this Act, see Pt. IV. Bk. I. The assent, if not under seal, need not be stamped: *Kemp v. I. R. Commrs.*, [1905] 1 K. B. 581. A devisee cannot insist on a conveyance in preference to an assent: *Re Pix*, [1901] W. N. 165.

of the executor, the law has for this purpose prescribed no specific form; and it may be either express or implied (*s*): The executor may not only in direct terms authorize the legatee to take possession of his legacy, but his concurrence may be inferred either from direct expressions or particular acts; and such constructive permission will be equally available (*t*). Thus, for instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it; or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee; or if the executor himself purchases the horse of the legatee, or merely offers him money for it, this amounts to an assent by implication to the legacy (*u*). So where the legatee of a term of years grants it to the executor, his acceptance of the grant, either for himself or as trustee, is an implied permission that the term shall be the legatee's to grant (*x*). So in a case where the rents or interest of a bequest are directed to be applied for the maintenance of the legatee during minority, if the executor commences so to apply them, his consent to the principal will be presumed (*y*). So where a term of years, subject to a quit rent, was devised, and after the testator's death his administrator with the Will annexed paid the quit rent for six years, and in an account rendered to the devisee, debited him with the payments so made; Tindal, C. J., held that this was sufficient to show the assent of the administrator to the bequest (*z*): The mere fact, however, that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specifically out of or on account of the rents—is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to (*a*). So also if the legacy be subject to a charge, which is paid by the

(*s*) Whether there has been an assent or not may involve matters of law, but it is generally a question of fact: *Elliott v. Elliott*, 9 M. & W. 27, per Lord Abinger; *Mason v. Farnell*, 12 M. & W. 674. The form of assent prescribed in Forms 51 or 52 in the First Schedule to the Land Transfer Rules, 1903 (see Rule 185), must be produced to authorize the registrar to register the person named in the assent as proprietor of the land under sect. 3 (4) of the Land Transfer Act, 1897.

(*t*) Com. Dig. Admon. (C. 6); Toller, 308, 309.

(*u*) Wentw. Off. Ex. 414, 14th edit.; Com. Dig. Admon. (C. 6); Toller, 309.

(*x*) Wentw. Off. Ex. 414, 14th edit.; Com. Dig. Admon. (C. 6).

(*y*) *Paramour v. Yardley*, Plowd. 539.

(*z*) *Doe v. Mabblerley*, 6 C. & P. 126.

(*a*) *Thorne v. Thorne*, [1893] 3 Ch. 196.

executor: the assent to the charge is assent to the disposition of the fund out of which it is to be satisfied (*b*).

Again, when the executor informs a legatee that he intends him to have the legacy according to the devise (*c*), or that the legacy is ready for him whenever he will call for it (*d*); such declarations clearly amount to a good assent to the bequest.

On the other hand, since the assent to a legacy by an executor may, in its consequences, be of great prejudice to him, it is but reasonable that the act or expressions deemed sufficient to impart that assent should be unambiguous (*e*). Hence a proposition stated in a book of authority (*f*) may be doubted; viz., that if the executor say to a legatee "God send you joy of your legacy," those expressions will amount to an assent: For if such words were uttered before the executor had had an opportunity of examining the testator's affairs, it would surely be unjust to construe words of congratulation into terms of assent to a legacy, so as to involve the executor in the consequences of a *devastavit*; although it may be otherwise, if those expressions were uttered after the executor had had sufficient time to acquaint himself with the state of the assets (*g*).

If a term of years or other chattel be bequeathed to A. for life, with remainder to B., and the executor assents to the interest of A., such interest will enure to vest that of B.; and *e converso*; for the particular estate and the remainder constitute but one estate (*h*). On the assent to the possession of the first taker of settled chattels, he takes them in trust for the ulterior legatees subject to his own prior interest (*i*). So an assent to a bequest of a lease for years is an assent to a condition or contingency annexed to it (*j*): As if there be a devise of a term to the testator's widow so long as she continue unmarried; and if she marry, then of a rent payable out of the land; the

(*b*) *Young v. Holmes*, 1 Stra. 70.

(*c*) Touchst. 456; *Barnard v. Pumfrett*, 5 M. & Cr. 70, per Lord Cottenham.

(*d*) *Hawkes v. Saunders*, Cowp. 293; *Barnard v. Pumfrett*, 5 M. & Cr. 70.

(*e*) See *Doe v. Harris*, 16 M. & W. 517.

(*f*) Shep. Touchst. 456.

(*g*) 1 Rep. Leg. 736, 3rd edit.

(*h*) *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81. But where there is a bequest of a number of articles, as stock-in-trade or plate, the executor may properly withhold his assent as to part: *Elliott v. Elliott*, 9 M. & W. 23.

(*i*) *Re Swan*, [1915] 1 Ch. 829.

(*j*) Com. Dig. Admon. (C. 6).

executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage (*k*). So an assent to a devise of a chattel lease is an assent to a devise of rent out of it (*l*). But if a lessee for years bequeaths a rent to A. and the land to B., it has been doubted whether the executor's assent that A. shall have the rent is an assent that B. shall have the land (*m*). However, it is said to be now established, that in this case also, an assent to the bequest to one shall enure to the benefit of the other; on the ground that as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises, from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro rata* (*n*).

In certain cases, the assent of the executor may be presumed; upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied (*o*). So, as it would seem, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor (*p*). Presumed assent

The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands; or in the case of a devise of a term for years, provided the devisee will pay the rent in arrear at the testator's death; and in that case, if the condition be not performed, there is no assent (*q*). But it would seem that if the condition is such as the executor had no authority to impose, for example, if he should declare his assent, provided the legatee went to York, and there did a thing for the executor's personal benefit, the assent would be considered absolute (*r*). So if the assent be on Conditional assent.

(*k*) *Goffe v. Haywood*, 1 Roll. Abr. 620, tit. Devise (E.) pl. 2.

(*l*) Com. Dig. Admon. (C. 6); 1 Roll. Abr. 620, tit. Devise (E.) pl. 3.

(*m*) *Gough v. Howarde*, 3 Bulst. 122.

(*n*) 1 Rep. Leg. 738, 3rd edit.

(*o*) See *Cray v. Willis*, 2 P. Wms. 531, 532.

(*p*) Mathews on Presumptions, 267; 3 Preston, Abstr. 145, 2nd edit.; *Cole v. Miles*, 10 Hare, 179. This appears to be a question for the jury: *Richardson v. Gifford*, 1 Adol. & Ell. 52.

(*q*) Wentw. Off. Ex. 429, 14th edit.

(*r*) *Elliott v. Elliott*, 9 M. & W. 28, per Parke, B.

a condition subsequent, as, provided the legatee will pay the executor a certain sum annually, such condition is void, and a failure in performing it shall not divest the legatee of his legacy (s).

By whom the
assent can be
given.

It must now be inquired by whom the assent to a legacy may be given. It has appeared in an earlier part of this Work, that a person appointed executor may assent to a legacy before he proves the Will (t), and that even if he should die without taking probate, his assent would be effectual (u). Again, there has already been occasion to observe that if several executors be appointed, the assent of any one of them is sufficient (x); and therefore if there be a legacy to one of several executors, he may take it of his own assent, without the others (y). Further, the efficacy of an assent by an administrator *durante minore ætate*, in case of an infant being constituted executor (z), has been elsewhere previously considered in this Treatise.

Effect of
assent.

At law, after an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee (a), so that he may bring ejectment (b), or trover (c), to recover it, even against the executor himself. And there has already been occasion to show (d), that an executor who has assented unconditionally to a specific bequest of the testator's leaseholds, is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases.

If there be a specific bequest to the executor himself in trust, and he assents to it, the thing bequeathed thereupon ceases to be a part of the testator's assets, and the executor becomes a trustee of it for those who are beneficially interested (e), and he is thereupon precluded from dealing with it or making title as executor (f).

(s) Wentw. Off. Ex. 429, 14th edit.

(t) *Ante*, p. 214.

(u) *Ibid*.

(x) *Ante*, p. 711.

(y) 1 Roll. Abr. 618; Devise (B.) pl. 2; Perk. s. 572; Com. Dig. Admon. (C. 8); *Townson v. Tickell*, 3 B. & A. 31, 40.

(z) *Ante*, p. 399.

(a) *Ante*, p. 695, note (i); *Doe v. Guy*, 3 East, 120. See, as to leaseholds, *Re Culverhouse*, [1896] 2 Ch. 251.

(b) *Doe v. Guy*, *supra*.

(c) *Williams v. Lee*, 3 Atk. 223.

(d) *Ante*, p. 1081; *Shadbolt v. Woodfall*, 2 Coll. 30.

(e) *Dix v. Burford*, 19 Beav. 409.

(f) *Attenborough v. Solomon*, [1913] A. C. 76.

It is likewise true, as a general proposition, that if an executor once assent to a legacy, he can never afterwards retract (*g*); and notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them (*h*). But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor under particular circumstances, should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasion a deficiency (*i*). Moreover, if the assent has been completed by a payment or possession, and *afterwards debts appear*, of which the executor had no previous notice, he may compel the legatee to refund (*j*).

In what cases the assent may be retracted.

The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests (*k*). So such assent shall, by relation confirm an intermediate grant by the legatee of his legacy (*l*).

Relation of assent to death of testator.

But the assent can only operate in favour of the legatee to whom the legacy is given, and therefore if by a codicil subsequently discovered the legacy is revoked and given to another,

(*g*) Wentw. Off. Ex. 415, 14th edit.; Com. Dig. Admon. (C. 8). The author of "The Office of an Executor" expresses his opinion that an assent cannot be *after a disassent*, but thinks the question doubtful: p. 415 *et seq.*, 14th edit. So, if executors have set apart and appropriated assets to meet a legacy, and have admitted to the legatee that such appropriation has been made, they cannot retain or impound any part of such appropriated assets to meet a debt from the legatee to the general estate of the testator: *Ballard v. Marsden*, 14 C. D. 374.

(*h*) *Mead v. Orrery*, 3 Atk. 238; Toller, 311.

(*i*) See 1 Rep. Leg. 743, 3rd edit.

(*j*) See *post*, p. 1189; *Doe v. Guy*, 3 East, 123; *ante*, p. 695, note (*i*).

(*k*) Wentw. Off. Ex. 445, 446, 14th edit.; *Saunders' Case*, 5 Co. 12, b.; *Rex v. Commrs. of Income Tax*, [1920] 1 K. B. 468.

(*l*) Toller, 311. This is put doubtingly in Wentw. Off. Ex. 69, 445, 14th edit.; and see the remark of Gibbs, C. J., at the conclusion of his judgment in *Doe v. Sturges*, 7 Taunt. 223.

the latter can recover the legacy and mesne profits from the first legatee (*m*).

Executor's
assent to his
own legacy :

In a case of a legacy bequeathed to the executor, the union of the two characters of executor and legatee in one person makes no difference; for his assent is as necessary to a legacy vesting in him in the capacity of legatee, as to a legacy vesting in any other person (*n*): and that on the same principle, viz., that until he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (*o*).

His assent to his own legacy may, as well as his assent to that of another legatee, be either express or implied: He may not only, in positive terms, announce his election to take it as a bequest, but such election may also be implied from his language or his conduct (*p*). The rule as to the latter, as laid down by Gibbs, C. J., *Doe v. Sturges* (*q*), is that "if an executor, in his manner of administering the property, does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy."

Therefore, if the executor say that he will have the legacy according to the Will (*r*); or if by deed reciting that he has a term for years by devise, he grant it over (*s*); this will amount to an assent to take it as legatee. So if he take the profits of a term to his own use (*t*), or repair the tenement bequeathed at his own expense (*u*), or if he exclude a co-executor from a joint-occupancy of a term with him (*v*), all these acts indicate an assent to the bequest. So if a term of years be devised to the executor for life, and afterwards to A. B., if the executor say that A. B. will have it after him, that implies an election to take it as legatee (*x*). In like manner, if he perform a condition or

(*m*) *Re West*, [1909] 2 Ch. 180.

(*n*) Toller, 345.

(*o*) Wentw. Off. Ex. 67, 68, 14th edit.; Toller, 345.

(*p*) Toller, 345; *Fenton v. Clegg*, 9 Exch. 680.

(*q*) 7 Taunt. 223.

(*r*) Com. Dig. Admon. (C. 6); *Garrett v. Lister*, 1 Lev. 25.

(*s*) Com. Dig. Admon. (U. 6). So if he dispose of it by his own Will: *Fenton v. Clegg*, 9 Exch. 680.

(*t*) Com. Dig. Admon. (C. 6).

(*u*) Com. Dig. Admon. (C. 6); *Cheyney v. Smith*, 1 Leon. 216.

(*v*) *Anon.*, Dyer, 277, b; Com. Dig. Admon. (C. 6).

(*x*) *Garrett v. Lister*, 1 Lev. 25; Com. Dig. (C. 6).

trust annexed to the devise; as if a lessee for years devise his term to his executor, on condition of his paying 10*l.* a year to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legatee, and it is in law an execution of the legacy for ever; for he who performs the charge of a thing, claims the benefit which is annexed to it (*y*). Again, an assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character (*z*). On the other hand, if the executor merely say, that the testator "left all to him" (*a*), this will not amount to an election to take as legatee. Further, if the executor demise a term bequeathed to him by the description of executor, this cannot be construed into an assent, because the act is consistent with his power and character as executor (*b*): And even a lease by him in his own name, if the lease be in its terms inconsistent with his title as legatee, will not amount to an assent to take as legatee (*c*): It is a rule, that it is not sufficient, to constitute an implied assent, to show that the act is equally applicable to the title of legatee as to the character of executor (*d*).

Until the executor has made his election, either express or implied, he shall take the legacy as executor, though all the debts have been paid independently of such bequest (*e*).

Where executors assent to specific legacies of shares or mortgages the costs of transfer, including the executor's own costs in connection therewith, must be borne by the specific legatees (*f*).

With regard to the effect of *entry* by the executor into possession of a term of years bequeathed to him the following distinction exists: Where the *entire* term is given to the executor, an entry will amount to an election to take as legatee: But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any *partial* interest, he must do something more than enter, in order to give assent to

Effect of executor's entry into possession of a term bequeathed to him.

(*y*) *Paramour v. Yardley*, Plowd. 544; Com. Dig. Admon. (C. 6).

(*z*) *Hinson v. Button*, 2 Roll. Rep. 158.

(*a*) 1 Roll. Abr. 620, Devise, (D.) pl. 6; Com. Dig. Admon. (C. 7).

(*b*) *Cheyney v. Smith*, 1 Leon. 316; Com. Dig. Admon. (C. 7).

(*c*) *Doe v. Sturges*, 7 Taunt. 222.

(*d*) *Ibid.* 217. See also *Trail v. Bull*, 1 Coll. 360, per K. Bruce, V.-C., accord.

(*e*) Com. Dig. Admon. (C. 5); cf. *Re Venn and Furze's Contract*, [1894] 2 Ch. 101. But see *Re Verrell's Contract*, [1903] 1 Ch. 65; *Attenborough v. Solomon*, [1913] A. C. 76.

(*f*) *Re Grosvenor*, [1916] 2 Ch. 375.

his legacy (*g*). There is a substantial reason for this distinction; for if his general entry on his life estate were an election to enter as legatee, it would necessarily confirm the remainder devised over (*h*): and that might happen in cases wherein he might want the estate in remainder for sale, in order to pay the testator's debts: Such an assent would be a *devastavit* in the executor, which might be a grievous hardship to him: But if the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit* (*i*).

In *Doe v. Sturges* (*j*), the law on this subject was fully considered by the Court of Common Pleas: In that case the testator bequeathed a term of years to his nephew Samuel Haynes for life, with remainder over, appointing Samuel and two other persons trustees and executors, with power for Samuel during life, and afterwards for the surviving executors and trustees, to demise the lands for twenty-one years: Samuel alone entered upon the property at the testator's death, and demised it for fourteen and forty-two years, reserving the rent to himself, his executors, &c.: He also made the contract for this lease in his own name, and disposed of the estate by his Will, one of his co-executors being alive: The estate was claimed by the plaintiff, deriving title under the Will of the first testator, in opposition to the interest of the defendant, a purchaser from the lessee: The lease could not be supported under the power, and, as a demise by a mere tenant for life, it determined upon his death; but as a lease by one of several executors, it might be supported, unless the executor Samuel had previously assented to the devise himself: In that event, the legal interest in the term in remainder after his death vested in the devisees over, which entitled them to recover; since the demise by the executor, in the character of a legatee, could only continue during his life: But the Court decided, that neither his entering into the land, nor his sole lease reserving rent to himself and his executors (which was alike inconsistent with his interest as tenant for life, and his duty as executor), should be

(*g*) *Doe v. Sturges*, 7 Taunt. 217, 221; *S. P.*, per Parke, J., *Doe v. Tatchell*, 3 B. & Adol. 680. See Touchst. 457, *contra*.

(*h*) See *ante*, p. 1104.

(*i*) *Doe v. Sturges*, 7 Taunt. 217, 221, by Gibbs, C. J., 514.

(*j*) 7 Taunt. 217.

deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor.

In the case of the *Att.-Gen. v. Potter* (*k*), a testator bequeathed a leasehold house, and his residuary estate, to his wife, and John Lane and James Potter, whom he appointed his executrix and executors, in trust to permit his said wife to receive the rents, interests and profits for life, and afterwards to pay certain legacies, and the residue was given to Ann, the wife of the said James Potter, and three others, or such of them as should be living at his death: The widow, with the permission of her co-executors, retained possession of the house during her life, and Ann Potter, together with the three others, executed a deed, whereby they agreed to take as tenants in common; and it was also executed by James Potter the executor, and husband of Ann; And it was held by Lord Langdale, M. R., that no assent to the legacy of the house in remainder had been constituted by these facts.

However, an entry by an executor, to whom a partial interest only in a term of years had been bequeathed, may, accompanied by other circumstances, amount to an election to take as legatee: As where an executor, devisee for life of a term of years, enters upon the lands, explaining the act by a declaration that he claims the estate as devisee for life (*l*). So where a lease is devised to an executor, during the minority of the testator's eldest son, to the intent that with the profits he should educate all the children, and the residue of term, after the son attains twenty-one, is given to him; the entry of the executor generally, coupled with an application by him of the rent in educating the children, will amount to an assent, not only to the devise to himself, but of the residue of the term to the eldest son (*m*). In *Doe v. Tatchell* (*n*), a testator bequeathed a term in premises to R. Sharp, his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of the testator's son during his life: He bequeathed the remainder after the son's decease to such uses as the son should by his Will appoint; and

(*k*) 5 Beav. 164.

(*l*) *Welcden v. Elkington*, Dyer, 358. *b*, 359.

(*m*) *Paramour v. Yardley*, Plowd. 539. See also *Young v. Holmes*, 1 Stra. 710.

(*n*) 3 B. & Adol. 675.

he appointed Sharp his executor: When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there: At the funeral, Sharp said, in presence of the journeyman and other persons, "The house is young Batten's (meaning the son's), Tatchell (the journeyman) must stay in the house and go on with the business, but young Batten must have a bidding place." Tatchell accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son who was weak in intellect and unable to provide for himself: Sharp lived twenty years afterwards, and did not interfere further with the property: And the Court of King's Bench held, that that was a sufficient evidence of a disposal of the property by Sharp according to the trusts in the Will, and that he had assented to take under the Will as legatee in trust, and not as executor (o).

This decision, it may be observed, demonstrates that it is not essential for the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest: And accordingly, in *Trail v. Bull* (p), where a testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave her for life, and after her death he directed that they should be sold and the produce divided among his four children, and he appointed his wife and another person his executrix and executor: and upon his death his wife entered into possession of his personal property, including the leasehold houses, and paid all his debts; it was held by Knight Bruce, V.-C., that, under the circumstances of the case, she had assented to the legacy to the children.

In *Richards v. Brown* (q), a testator bequeathed to a Miss Wade, whom he appointed executrix, his household furniture for her life, and after her death to Sarah Chapple: The testator, at the time of his decease, which took place in the year 1825, was indebted in 100*l.* on a promissory note, which he had made in the year 1816, and on which he had regularly paid interest during his life: On his death, Miss Wade took possession of the furniture, and continued to pay interest on the note up to the year 1831: On her death, in the year 1832, Sarah Chapple took

Executor
taking possession
of chattels
bequeathed to
him for life.

(o) See also *Fenton v. Clegg*, 9 Exch. 680.

(p) 1 Coll. 352, affd. 22 L. J. Ch. 1082.

(q) 3 Bingh. N. S. 493, ante, p. 1082.

possession of the furniture: And it was contended that Miss Wade, by so taking possession under the bequest to her for life, had assented to the residuary bequest of S. Chapple: But the Court of Common Pleas held, that this did not, under the circumstances, amount to such an assent: And Tindal, C. J., said, that though an assent to a particular estate in the property bequeathed is an assent to the estate in remainder also, yet, as Miss Wade might have taken the furniture either as executrix or as legatee, and as there was no reason for presuming that she took it on the bad title of a legatee while debts remained unpaid, when she might have taken it on a good one as executrix, it must be intended that she held it as executrix.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual; and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (*r*).

Executor's assent to his own legacy after renouncing.

If one of several executors be a legatee, his single assent to his own legacy will vest the complete title in him (*s*): And if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (*t*).

Assent of one of several executors to his own legacy.

SECTION IV.

At what time Legacies are to be paid: and herewith of Bequests for Life, with remainder over.

On the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distributions (as will hereafter be seen), is a year from the testator's death, during which it is presumed that the executor may fully inform himself of the

Legacies generally payable at the end of a year from testator's death.

(*r*) *Broker v. Charter*, Cro. Eliz. 92. And by reason of Stat. 20 & 21 Vict. c. 77, s. 79 (*ante*, p. 199), the law is now the same, where the legatee, being one of several executors, renounces, and the others prove the Will.

(*s*) 1 Roll. Abr. 618, Devise (B.), pl. 2, 3; *Townson v. Tickell*, 3 B. & A. 31, 40; *ante*, pp. 711, 1108.

(*t*) *Ibid*.

state of the property (*u*). But within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death (*x*).

This allowance, however, to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them (*y*). Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so (*z*).

Again where a legacy was given to A. to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator; it was holden that B. was entitled to receive the legacy immediately upon the death of A.: for although it was objected, that this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held that the year's time must be intended to be from the death of the testator; whereas in this case the testator had been dead much longer (*a*).

Practice in an
administration
action.

According to the ordinary practice in an action to administer the assets of a deceased testator, the Court in the first place waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid (*b*): They are paid their principal, and if entitled to

(*u*) *Wood v. Penoyre*, 13 Ves. 333, 334; *Pearson v. Pearson*, 1 Scho. & Lefr. 11; Toller, 312.

(*x*) See *Benson v. Maude*, 6 Madd. 15. In *Brooke v. Lewis*, 6 Madd. 358, the testator gave certain legacies, which he directed to be paid within six months after his decease; and he directed the residue to be divided among certain persons named, or such of them as should be living at the time the same should be distributed: And it was holden, that the residue was to be divided among the legatees named, who were living at the end of one year after the death of the testator.

(*y*) *Garthshore v. Chalie*, 10 Ves. 13.

(*z*) *Pearson v. Pearson*, 1 Scho. & Lefr. 12, by Lord Redesdale. "I know of no case," said Lord Eldon, in *Angerstein v. Martin*, 1 Turn. & R. 241, "which prevents executors, if they choose, from paying legacies, or handing over the residue, within the year: and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." His Lordship also observed, on another occasion, that if a case was produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months: *Garthshore v. Chalie*, 10 Ves. 13.

(*a*) *Laundy v. Williams*, 2 P. Wms. 478.

(*b*) *Thomas v. Montgomery*, 1 Russ. & M. 737.

interest, they are paid interest at the rate of four per cent. up to that time (c).

✓ But if it clearly appears, that a surplus will remain, after discharging all the testator's debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors (d).

In a case (e) where it appeared, upon affidavits, that the estate was large, with but few debts or charges thereon, the Court ordered the jointure of the widow of the testator and annuities given by his Will, to be paid out of the income of the estate, *before decree*, but refused to direct the payment of the pecuniary legacies.

Where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of the year from the testator's death; and he is not bound to give security for repayment of the money, in case the event should happen: Thus where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A. without issue of her body, payment was decreed in the lifetime of A., and without security for refunding (f). But where a legacy was given to a father, on condition that he did not interfere with the education of his daughter; on a bill by the father, for his legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy (g).

Legacy
subject to a
divesting
contingency.

If an annuity be given by Will, it shall commence immediately from the testator's death, and consequently the first payment shall be made at the expiration of a year next after that event (h). Where an annuity is expressly directed to commence

Annuity.

(c) See R. S. C. 1883, Ord. LV. r. 64; *Re Gardner*, 67 L. T. 552; *Re Campbell*, [1893] 3 Ch. 468; *Re Inman*, *ibid.* 518; *Re Snaith*, 71 L. T. 318; and see *post*, p. 1153.

(d) *Thomas v. Montgomery*, 1 Russ. & M. 729. But the legatees are not entitled to have the fund appropriated, subject to the eventual demands established: see R. S. C. 1883, Ord. L. r. 9.

(e) *Digby v. Boycott*, 4 Hare, 444.

(f) *Fawkes v. Gray*, 18 Ves. 131. See also *Griffiths v. Smith*, 1 Ves. 97; 1 Rep. Leg. 752, 3rd edit.

(g) *Colston v. Morris*, 6 Madd. 89.

(h) By Lord Eldon, in *Gibson v. Bott*, 7 Ves. 96, 97, and in *Fearn*s

within the year, as at the first quarter-day after the testator's death (*i*), or where an annuity is given with a direction that it shall be paid monthly (*k*), the money will be due at the first quarter-day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor, till the end of the year. Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator; and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year (*l*). Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death; the annuity does not commence till fifteen months from the death of the testator (*m*).

Bequests for
life, remain-
der over:

A distinction was taken by Lord Eldon, in *Gibson v. Bott* (*n*), between an annuity and a legacy for life: "If an annuity," said his Lordship, "is given, the first payment is made at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest" (*o*).

However, a different doctrine prevails with respect to a bequest of the *residue* of personal estate for life, with remainder over. The later decisions have established that the person taking the residue for life is entitled to the income, in some shape or other, from the death of the testator (*p*). The executors,

v. Young, 9 Ves. 553; *Stamper v. Pickering*, 9 Sim. 176; *Re Robbins*, [1907] 2 Ch. 8, 13. See also *Houghton v. Franklin*, 1 Sim. & Stu. 392, where Sir J. Leach observes that, as a Will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expressions in the Will to control that intention. Trustees are bound to deduct income tax in paying annuities, unless the Will otherwise directs: *Re Sharp*, [1906] 1 Ch. 793; *Re Shaw*, [1918] P. 47; *Re Hatch*, [1919] 1 Ch. 351; and see *Re Foster*, [1920] 1 Ch. 391; *Re Dorat*, [1920] W. N. 262.

(*i*) *Storer v. Prestage*, 3 Madd. 167.

(*k*) *Houghton v. Franklin*, 1 Sim. & Stu. 390.

(*l*) *Irvin v. Ironmonger*, 2 Russ. & M. 531.

(*m*) *Ibid.*

(*n*) 7 Ves. 89, 96.

(*o*) A sum of money, directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, not as an annuity, payable from the death: *ibid.* 97; *Re Friend*, 78 L. T. 222.

(*p*) *Angerstein v. Martin*, 1 Turn. & R. 232; *Hewitt v. Morris*,

when they have dealt with the estate, will be taken by the Court as having applied in payment of debts, legacies, and other charges such portion of the fund as, together with the income of that portion for one year, was necessary for the payment thereof (*q*). And when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest (*r*). But the rule laid down in *Allhusen v. Whittell* is not to be slavishly followed in every case where residue is settled, and should not be applied where large sums have been expended in clearing the estate at intervals considerably prior to the end of the first year (*s*).

Some difficulty, however, exists in applying this doctrine in instances where the testator has directed the residue to be invested in specified securities.

The principle in *Dimes v. Scott* (*t*), it is now established, is that applicable (*u*). There the testator directed the residue of his personal estate to be converted into money, and invested in government or real securities in trust for A. for life, and after his death for B.: Part of the estate consisted of a share which the testator had in an Indian loan bearing interest at ten per

Rule in
Dimes v. Scott:
direction to
convert:

1 Turn. & R. 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Dimes v. Scott*, 4 Russ. 195; *Douglas v. Congreve*, 1 Keen, 410; *Taylor v. Clarke*, 1 Hare, 161; *Macpherson v. Macpherson*, 1 Macq. H. of L. 243. But see *contra*, *Taylor v. Hibbert*, 1 Jac. & Walk. 308; *Stott v. Hollingworth*, 3 Madd. 161; and *Amphlett v. Parke*, 1 Sim. 275.

(*q*) *Allhusen v. Whittell*, L. R. 4 Eq. 295; *Lambert v. Lambert*, L. R. 16 Eq. 320. "Income" includes profits of the testator's business: *Re Elford*, [1910] 1 Ch. 814. As to how the principle is to be applied where the debt is an annuity, see *Re Poyser*, [1910] 2 Ch. 444, following *Re Perkins*, [1907] 2 Ch. 506.

(*r*) *Wrightwick v. Lord*, 6 H. L. C. 226; see Pt. III. Bk. III. Ch. v. § 1. This rule was applied to real estate in *Marshall v. Crowther*, 2 C. D. 199.

(*s*) *Re McEuen*, [1913] 2 Ch. 704.

(*t*) 4 Russ. 195.

(*u*) In *Morgan v. Morgan*, 14 Beav. 72, 92 Romilly, M. R., not only considered himself bound to follow the decision in *Dimes v. Scott*, and adopted accordingly the principle there laid down, but added that it seemed to him to be that which was least open to objection. See accord. *Re Llewellyn's Trusts*, 29 Beav. 171; *Yates v. Yates*, 28 Beav. 637; *Holgate v. Jennings*, 24 Beav. 623; *Brown v. Gellatly*, L. R. 2 Ch. 751; *Porter v. Baddeley*, 5 C. D. 542. See also *Macpherson v. Macpherson*, 1 Macq. H. of L. 243. With regard to the controversy which formerly existed, see *La Terriere v. Bulmer*, 2 Sim. 18; *Douglas v. Congreve*, 1 Keen, 410; *Taylor v. Clarke*, 1 Hare, 161; and *Morgan v. Morgan*, *ubi supra*, referred to in earlier Editions of this Work.

cent.: After it had been determined that a conversion ought to have been made into three per cent. stock at the end of a year after the testator's death, a question arose, whether the tenant for life was entitled to the interest actually made during the year: and it was held by Lord Lyndhurst, that the tenant for life should be allowed during that period, in lieu of the actual income, the dividends on so much three per cent. stock as the proceeds of the property, if converted at the end of that year, would have purchased.

The rule in *Dimes v. Scott* applies where securities ought to be converted, and in such case the tenant for life will be entitled to the dividends upon so much three per cent. stock as the proceeds would have purchased at the end of the year.

When property is given by Will on trusts for conversion and investment, and to hold the investments on trust for a tenant for life and remaindermen, with a discretionary power to the trustees to postpone the conversion, and a provision that the income until conversion is to go to the tenant for life, that provision extends to property (such as a reversionary interest) which is not producing income as well as to property of a wasting character (*v*).

rule not
applicable
where there is
a prohibition
against
conversion :

The rule does not apply where there is a prohibition against conversion (*x*), for in such case, as in the case where the testator has authorised retention of the fund in specified securities other than those which a Court of Equity would approve, the tenant for life is entitled during the continuance of the investment to the specific income (*y*).

rule appli-
cable
although
there is a
power to
delay con-
version.

Where there is no prohibition against conversion but merely a power to delay conversion, and in the meantime to maintain the investment or user as it was at the testator's death, the property must be valued as of the time of the testator's death, and the tenant for life will have four per cent. on such value as falling within the third division pointed out by Parker, V.-C., in *Meyer v. Simonsen* (*z*), which divisions are the following:—First,

(*v*) *Re Rowlls*, [1900] 2 Ch. 107; following *Mackie v. Mackie* (1845), 5 Hare, 70.

(*x*) *Green v. Britten*, 1 De G. J. & S. 649.

(*y*) *Brown v. Gellatly*, L. R. 2 Ch. 751; *La Terriere v. Bulmer*, 2 Sim. 18; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, 337.

(*z*) 5 De G. & S. 723. See also *Re Beech*, [1920] 1 Ch. 40. The principle of the cases of *Meyer v. Simonsen*, *post*, p. 1122, note (*m*), and *Brown v. Gellatly*, *ubi supra*, was, in *Wentworth v. Wentworth*, [1900] A. C. 163, applied by the House of Lords to rents and royalties from mining leases, but their lordships did not think that it would be expedient to hamper the Court by laying down any fixed rule as to

where the subject-matter of the bequest is either invested in the funds or in some security of which the Court approves, mere conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the *corpus* belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remaindermen; such a case is one of partial conversion and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest and the remainderman the *corpus*. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate (a). There the rule is not to convert the property but to set a value upon it, and to give the tenant for life four per cent. on such value, and the residue of the income must then be invested and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainderman (b).

In calculating the value of a reversionary interest of property within the third division, although generally the value is to be taken as at the end of one year from the testator's death according to tables of life average, yet if the reversion has fallen in before valuation, the estimate must be on the assumption that the reversion would fall in when it actually did (c).

Time when the value of a reversionary interest should be calculated.

With regard to contingent legacies, the tenant for life is entitled to the intermediate income of the fund set apart to meet them. That fund is residue until it is wanted (d).

Intermediate income of contingent legacies forms part of residue.

the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property; they therefore held that the tenants for life were entitled to receive out of the rents and royalties such an annual sum as, in the opinion of the Court, would, under all the circumstances of the case, be a fair equivalent for the annual income that would have resulted if the estate had been converted. See *Re Owen*, [1912] 1 Ch. 519; *Re Beech*, [1920] 1 Ch. 40.

(a) As in *Gibson v. Bott*, 7 Ves. 89; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312; and *Re Llewellyn's Trust*, 29 Beav. 171.

(b) In adjusting the rights as between tenant for life and remaindermen in respect of a reversionary interest, which ought to have been, but was not, converted by trustees, interest should be calculated at 3 per cent.: *Re Rowlls*, [1900] 2 Ch. 107; *Re Davy*, [1908] 1 Ch. 61; but see now *Re Beech*, *supra*.

(c) *Wright v. Lambert*, 6 C. D. 649; following *Wilkinson v. Duncan*, 23 Beav. 469.

(d) *Allhusen v. Whittell*, L. R. 4 Eq. 295. Cf. *Re Whitehead*, [1894] 1 Ch. 678.

It is, however, obvious, that the language of a Will may be such as to entitle the tenant for life to receive the actual income of the testator's property *in specie*, as it stood at his death, and nothing more or less until the property shall be actually converted, or at all events, until it might have been so, but for improper delay (*e*).

Where sale of real estate is, without impropriety, postponed, tenant for life is entitled to rents and profits until sale.

Where by a Will or settlement property is directed to be sold and converted and the proceeds held in trust for one for life and then for others, and the sale is without impropriety postponed, the person entitled to the life interest in the proceeds of sale is as regards real estate entitled to the rents and profits until sale (*f*).

Again, the claim of the tenant for life to any income at all during the year may, of course, be controlled by an opposite disposition of the income before investment. Thus, where a residue is directed to be laid out in land, to be settled on a person for life, with remainder over, and *the interest to accumulate* until the money is so laid out, the accumulation shall cease at the end of the year from the testator's death, and from that period the legatee for life will be entitled to the interest (*g*).

In *Vickers v. Scott* (*h*), where a testator directed a sale of his real estate with all convenient speed after his death, and that the produce, together with his residuary personal estate, should be invested, and the dividends be paid to one for life, and further directed that the trustee should stand possessed of the trust moneys and rents and profits until sale and investment; and the land remained unsold; Sir J. Leach, M. R., said that the tenant for life, by the clear language of the Will, was not entitled to the rents and profits of the residuary real estate until it had been sold and the produce invested: That it was consistent with principle and authority, that twelve months should be considered as the time within which the sale might reason-

(*e*) See *Wrey v. Smith*, 14 Sim. 202; *Mackie v. Mackie*, 5 Hare, 70; *Sparling v. Parker*, 9 Beav. 524.

(*f*) *Yates v. Yates*, 28 Beav. 637; *Re Searle*, [1900] 2 Ch. 829; and the rule is the same where real and personal estate are directed to be sold and the proceeds are to be held as one fund: *Re Darnley*, [1907] 1 Ch. 159; *Re Oliver*, [1903] 2 Ch. 74.

(*g*) *Sitwell v. Bernard*, 6 Ves. 520; *Stair v. Macgill*, 1 Bligh, N. S. 662; *Vigor v. Harwood*, 12 Sim. 172; *Tucker v. Boswell*, 5 Beav. 607; *Macpherson v. Macpherson*, 1 Macq. H. of L. 249. See also *Parry v. Warrington*, 6 Madd. 155; *Greisley v. Lord Chesterfield*, 13 Beav. 288, as to which case see, however, *Marshall v. Crowther*, 2 C. D. 199. As to the allocation of profits to interest and capital under a partnership deed, and the effect on the interest of a tenant for life, see *Straker v. Wilson*, L. R. 6 Ch. 503.

(*h*) 3 M. & K. 500.

ably have been made: And that from that time the tenant for life was entitled to the rents of the estate.

With respect to cases where the testator simply bequeaths all the residue of his personal estate for life with remainder over, without any direction to invest it in any particular manner, it must be observed, that, as between the tenant for life and the remainderman, where the residue consists in part, or wholly, of property in its nature perishable, and daily wearing out, such as leaseholds (not specifically given), the tenant for life will not be entitled to the annual produce which the property so wearing out is actually making, but to interest from the death on the estimated value (*i*). And it is a general rule (usually called the rule in *Howe v. Lord Dartmouth*), that where personal property is bequeathed for life, with remainder over, and not specifically, it is to be converted into the three per cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties: and the tenant for life is entitled only upon that principle (*k*). And it appears to be now established

Rule in
*Howe v. Lord
Dartmouth*:
no direction
to convert,
but property
of a character
not recognised
by the Court
as proper to
be continued:

(*i*) *Gibson v. Bott*, 7 Ves. 89; *Fearn v. Young*, 9 Ves. 552; 2 Rop. Leg. 298, 3rd edit. The general rule being that, where property is invested on a security of a wasting character, that must be realised, or, if it is not realised immediately, then the tenant for life is only entitled to interest on the realised value, unless the testator otherwise directs, the tenant for life will not get the profits until conversion, merely because the trustees exercise a discretionary power given to them to postpone conversion: *Brown v. Gellatly*, L. R. 2 Ch. 751, 757. But when a testator has himself expressly directed what shall be done with the income accruing during the period of postponement, the general rule does not apply: *Re Chancellor*, 26 C. D. 42. And see *Re Crowther*, [1895] 2 Ch. 56, as to profits of business pending sale; *Re Elford*, [1910] 1 Ch. 814.

(*k*) *Howe v. Lord Dartmouth*, 7 Ves. 137, *a*; *ante*, p. 930. See also *Wrightwick v. Lord*, 6 H. L. C. 217, 228. Railway shares, unless within the range of investments authorised by statute or by the Will, must be converted: *Thornton v. Ellis*, 15 Beav. 193. But this general rule does not apply to property of a testator who makes his Will and dies in India, leaving property and a family there, unless the parties come to this country; and then the person entitled in remainder can have the fund brought here and invested: *Holland v. Hughes*, 16 Ves. 111. Dividends in a public company earned before the testator's death, but declared afterwards, form income, and not corpus: *Bates v. Mackinley*, 31 Beav. 280. See also *McLaren v. Stainton*, De G. F. & J. 202; reversing *S. C.*, 27 Beav. 460; *Gilly v. Burley*, 22 Beav. 618; *Lock v. Venables*, 27 Beav. 598. Where trustees, without authority, lent trust money at interest at 5l. per cent., it was held that the tenant for life was entitled to the whole interest, and that the remainderman had no right to insist that the excess of the interest beyond the dividend, which would have been produced if the money had been invested in consols, formed capital: *Stroud v. Gwyer*, 28 Beav. 130. See also *Re Bird*, [1901] 1 Ch. 915; *Slade v. Chaine*, [1908] 1 Ch. 522; *Re Hoyles*, [1912] 1 Ch. 67.

with respect to the application of this rule, that the tenant for life is to be allowed, *as from the death of the testator*, the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognised and allowed to be continued by a Court of Equity (*l*). But that with regard to those parts of the personal estate which neither were at the testator's death, nor have since been, in such a state of investment as ought to be recognised and allowed to be continued by the Court, they must be valued as at a period of one year after his death; and interest at the rate of three (now four) per cent. per annum from his death, on the value so taken, must be paid to the tenant for life (*m*).—But though, for the purpose of determining the amount of income to which the tenant for life is entitled, the property must be thus feigned to be in a proper state of investment at that period, it does not follow that he can demand payment of income to that amount, until the property in respect of which it is payable shall be got in (*n*).

(*l*) It should be noted that, though the general rule in *Howe v. Lord Dartmouth* remains in full effect, yet it is no longer absolutely necessary to invest either in the three per cents. or on real security, for, since the decision of that case, various statutes have enlarged the class of securities in which an executor or trustee may invest. See Trustee Act, 1893, s. 1.

(*m*) *Caldecott v. Caldecott*, 1 Y. & Coll. Ch. C. 312, 737. See also *Turner v. Newport*, 2 Phil. Ch. C. 14; 14 Sim. 32; *Cox v. Cox*, L. R. 8 Eq. 343; *Wilkinson v. Duncan*, 23 Beav. 469; *Wright v. Lambert*, 6 C. D. 649; *Re Chesterfield's Trusts*, 24 C. D. 643; *Beavan v. Beavan*, 24 C. D. 649, note; *Re Hengler*, [1893] 1 Ch. 586; *Re Hollebone*, *infra*. The rate of interest is now four per cent.: *Re Hollebone*, [1919] 2 Ch. 93; *Re Beech*, [1920] 1 Ch. 40; and see *Re Owen*, [1912] 1 Ch. 519, where the income was insufficient to provide four per cent. In *Meyer v. Simonsen*, 5 De G. & Sm. 723, a testator gave the residue of his real and personal estate to trustees, upon trust to pay to his widow, or permit her to receive, the income and profits, and after her death he gave the capital over. The Will contained no direction as to the conversion of his estate. Part of it consisted of 12,000*l.*, invested in a partnership. Under a stipulation in the deed of partnership, the surviving partner gave a warrant of attorney to the executors of the testator, securing payment of that sum by instalments of 1,500*l.* a year, with interest at 5 per cent. on the unpaid balances. And it was held by Parker, V.-C., that the rule in *Howe v. Lord Dartmouth*, as applied to this case, required the trustees not to convert the property, but to set a value on it, and to give the tenant for life 4*l.* per cent. on the value, and to invest the residue of the surplus income, paying the income of these investments to the tenant for life, and appropriating the *corpus* to the remainderman. See accord. *Re Llewellyn's Trust*, 29 Beav. 171; and further *ante*, p. 1118, note (*z*).

(*n*) *Taylor v. Clarke*, 1 Hare, 161, 170. This principle is applied where there is a deficiency in the assets. Thus, where an obligor covenanted to pay, three months after his death, a fund to trustees,

The rule in *Howe v. Lord Dartmouth* amounts to this, that where there is a residuary bequest of personal estate (o) to be

upon trust for a tenant for life and remainderman, with interest from the date of his death until payment, and, several years after the obligor's death, assets were recovered which were insufficient to fulfil the covenant and bond, it was held that a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, and the difference between such principal and the sum recovered paid to the tenant for life: *Cox v. Cox*, L. R. 8 Eq. 343. The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other, and that neither is to suffer more damage in proportion to his estate and interest than the other suffers. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession. Where a fund is settled upon tenant for life and remaindermen, and is invested in accordance with the powers of the settlement upon a mortgage, which proves to be insufficient for the payment of principal and interest in full, the sum realised by the security ought to be apportioned between the tenant for life and the remaindermen, in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt: *Re Atkinson*, [1904] 2 Ch. 160; following *Re Moore*, 54 L. J. Ch. 432, and *Re Alston*, [1901] 2 Ch. 584 and overruling *Re Foster*, 45 C. D. 629, and *Re Phillimore*, [1903] 1 Ch. 942. Where the partial loss arises from an unauthorised investment, the tenant for life is entitled to such a proportion of the amount realised by the unauthorised investment, plus the income he received therefrom during its continuance, as the dividends he would have received from the authorised investment in the same period bear to the capital value of the authorised investment plus those dividends, the tenant for life being liable to bring into account all income he received from the unauthorised investment, although not liable to refund: *Re Bird*, [1901] 1 Ch. 916; *Re Grabowski's Settlement*, L. R. 6 Eq. 12, is distinguishable because there the intention was to settle a specific fund and not the debt, whatever it might amount to. In making the valuation in cases where the tenant for life dies before the assets are recovered, the valuation must be made according to the fact and not according to the tables of life average. See *Wright v. Lambert*, 6 C. D. 649, following *Wilkinson v. Duncan*, 23 Beav. 469, which was not altered by *Brown v. Gellatly*, L. R. 2 Ch. 751.

The principle applies where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainder over, and such residue includes outstanding personal estate, the conversion of which the trustees in the exercise of their discretion postpone for the benefit of the estate, and which eventually falls in some years after the testator's death, as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy. Such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum, which put out at interest at three per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate, with yearly rests and deducting income tax, would, with the accumula-

(o) *Semble*, the rule applies only where there is a disposition by Will of residuary personal estate given as one fund to be enjoyed by several persons in succession: *Re Van Straubenzee*, [1901] 2 Ch. 779.

enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character, and are consequently deemed to be more or less hazardous (*p*). This presumed intention of the testator may of course be rebutted by the words of his Will. Accordingly, where the bequest to the tenant for life is *specific*, the legatee in remainder is not entitled to have the property so converted, notwithstanding that, by reason of its being a decreasing fund, the legacies over may altogether fail (*q*). So where the bequest is not *specific*, in the strict sense of the expression, yet if the Court find in the Will an indication of intention that the property is to be enjoyed in its existing state, that intention must be carried into effect, and the property will be so enjoyed (*r*). The Court will find such an intention much more

rule not applicable where bequest to tenant for life is specific;

nor where intention is indicated that the property should be enjoyed in its existing state.

tion of interest, have produced at the day of receipt the amount actually received, and the sum so ascertained should be treated as capital and the residue as income: *Re Chesterfield's Trusts*, 24 O. D. 643, following *Beavan v. Beavan*, *ibid.* 649, note; *Re Hobson*, 55 L. J. Ch. 422; *Re Flower*, 62 L. T. 217; *Re Morley*, [1895] 2 Ch. 738; *Re Hollebone*, [1919] 2 Ch. 93. Where trustees having a discretionary power to postpone conversion never exercised their discretion as to the conversion of a reversionary interest which ought to have been sold, it was held that the fund must be apportioned on the principle of *Re Chesterfield's Trusts*, interest being calculated at the rate of three per cent. per annum: *Re Rowlls*, [1900] 2 Ch. 107. The rate of interest is now four per cent.: *ante*, p. 1122, n. (*m*).

(*p*) *Macdonald v. Irvine*, 8 C. D. 101, 112, *per* Baggallay, L. J.

(*q*) *Vincent v. Newcombe*, Younge, 599; *Lord v. Godfrey*, 4 Madd. 455; *Cockran v. Cockran*, 14 Sim. 248; *Bethune v. Kennedy*, 1 My. & Cr. 114. And see *ante*, p. 930. As to what constitutes a specific legacy, see *ante*, p. 915 *et seq.*

(*r*) *Ante*, p. 930; *Collins v. Collins*, 2 M. & K. 702; *Alcock v. Slopier*, 2 M. & K. 699; *Pickering v. Pickering*, 4 M. & Cr. 289; *Goodenough v. Tremamondo*, 2 Beav. 512; *Vaughan v. Buck*, 1 Phil. Ch. C. 75; *Harvey v. Harvey*, 5 Beav. 134; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Hinves v. Hinves*, 3 Hare, 609; *Cafe v. Bent*, 5 Hare, 24; *Hubbard v. Young*, 10 Beav. 203; *Hunt v. Scott*, 1 De G. & Sm. 219; *Burton v. Mount*, 2 De G. & Sm. 383; *Neville v. Fortescue*, 16 Sim. 333; *Harris v. Poyner*, 1 Drew. 174; *Marshall v. Bremner*, 2 Sm. & G. 237; *Hind v. Selby*, 22 Beav. 373; *Skirving v. Williams*, 24 Beav. 275; *Holgate v. Jennings*, 24 Beav. 623; *Boys v. Boys*, 28 Beav. 433; *Rowe v. Rowe*, 29 Beav. 276; *Green v. Britten*, 1 De G. J. & S. 649; *Wilday v. Sandys*, L. R. 7 Eq. 455; *Re Sewell's Estate*, L. R. 11 Eq. 80; *Thursby v. Thursby*, L. R. 19 Eq. 395; *Gray v.*

easily where the gift is an absolute one followed by an executory limitation (s). There is no distinction for the purposes of the rule between unauthorised securities of a wasting and those of a permanent nature (t).

If leaseholds which a tenant for life is entitled to enjoy *in specie* are taken compulsorily under the Lands Clauses Consolidation Act or sold under the Settled Estates Act, the purchase-money should be invested in an annuity having as many years to run as the original lease, and the proceeds paid to the person entitled to the proceeds of the leaseholds (u). Where in such a case the purchase-money was invested in consols it was held that after the death of the tenant for life her estate was entitled to the difference between the dividends received by her and the aggregate amount of the rental which would have been received during her life (v). And where, under similar circumstances, the tenant for life outlives the term he will be entitled to the whole fund (x).

Effect of a statutory sale of leaseholds enjoyed *in specie*.

If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder (y). The old practice of the Court of Chancery was

Inventory by legatee for life.

Siggers, 15 C. D. 74; *Re Chancellor*, 26 C. D. 42; *Re Sheldon*, 39 C. D. 50; *Re Wilson*, [1907] 1 Ch. 394; *Re Rogers*, [1915] 2 Ch. 437; *Re Nicholson*, [1909] 2 Ch. 111. For cases where the Court has *not* been able to find such intention, see *Lichfield v. Baker*, 13 Beav. 447 (see also 2 Beav. 481); *Benn v. Dixon*, 10 Sim. 636; *Caldecott v. Caldecott*, 1 Y. & C. C. C. 312; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441; *Chambers v. Chambers*, 15 Sim. 183; *Morgan v. Morgan*, 14 Beav. 27; *Thornton v. Ellis*, 15 Beav. 193; *Blann v. Bell*, 2 De G. M. & G. 775; *Murton v. Markby*, 18 Beav. 126; *Hood v. Clapham*, 19 Beav. 90; *Jebb v. Tugwell*, 20 Beav. 84; *Brown v. Gellatly*, L. R. 2 Ch. 751; *Tickner v. Old*, L. R. 18 Eq. 422; *Porter v. Baddeley*, 5 C. D. 542; *Macdonald v. Irvine*, 8 C. D. 101; *Re Game*, [1897] 1 Ch. 881; *Re Wareham*, [1912] 2 Ch. 311.

(s) *Re Bland*, [1899] 2 Ch. 336.

(t) *Re Nicholson*, [1909] 2 Ch. 111.

(u) *Askew v. Woodhead*, 14 C. D. 27, 34, *per* Jessel, M. R.

(v) *Jeffreys v. Connor*, 28 Beav. 328.

(x) *Re Beaufoy's Estate*, 1 Sm. & Giff. 20; *Phillips v. Sargent*, 7 Ha. 33. See also Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 34, as to sales under that Act. As to the mutual rights of tenants for life and remaindermen in respect of renewable leases and the duties of trustees with regard to them, see Lewin on Trusts, Chap. xv.; White & Tudor's Leading Cases in Equity, 7th edit., Vol. II., p. 693, Notes on *Keech v. Sandford*.

(y) *Slanning v. Style*, 3 P. Wms. 336; *Leeke v. Bennett*, 1 Atk. 471; *Bill v. Kinaston*, 2 Atk. 82.

to require the tenant for life to give security for the protection of the remainderman: But such security is not now required, unless a case of danger is shown (z).

Gift for life of things *quæ ipso usu consumuntur*.

It may here be observed, that a gift for life of things *quæ ipso usu consumuntur*, as corn and wine, *if specific*, is an absolute gift of the property; but if *residuary*, the things must be sold and the interest of the produce paid to the legatee for life (a).

Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur* within this rule (b). Where a wine merchant, possessed of a large stock of wine, by his Will gave everything he died possessed of to his wife for life, it was held that she took absolutely the wine which the testator had for his private use, but a life interest only in that kept for the purpose of trade (c).

Legacy to an infant.

Where the legatee is an infant, the executor cannot safely pay him, or any other person on his account, until he attains twenty-one, unless under the provisions of the statute 36 Geo. III. c. 52, s. 32, which, however, was repealed by the Trustee Act, 1893, except as to Scotland (d). In certain cases, indeed, he may apply the *interest* of the legacy to the maintenance of the infant: This subject will be pursued hereafter, together with the inquiry as to the proper person to whom legacies are to be paid (e).

Payment when legatee dies under age.

If a legacy be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one (f): But where interest is given during the minority, and the legatee dies

(z) *Foley v. Burnell*, 1 Bro. C. C. 279; *Conduitt v. Soane*, 1 Coll. 285.

(a) *Randall v. Russell*, 3 Meriv. 194; *Andrew v. Andrew*, 1 Coll. 690. See *Porter v. Tournay*, 3 Ves. 314. According to the old rule of the common law, a bequest of a term of years, or of a personal chattel, passed the whole property, and no remainder could be limited after it. But the objection was removed by changing the name from *remainders* to *executory bequests*: *Manning's Case*, 8 Co. 94, b; 95, a; 2 Saund. 338 k.

(b) *Groves v. Wright*, 2 K. & J. 347; *Myers v. Washbrook*, [1901] 1 Q. B. 360. But see *Breton v. Mockett*, 9 C. D. 95.

(c) *Phillips v. Beal*, 32 Beav. 25; *Cockayne v. Harrison*, L. R. 13 Eq. 432.

(d) See *post*, pp. 1137, 1138.

(e) *Post*, p. 1137 *et seq.*

(f) *Crickett v. Dolby*, 3 Ves. 13. And see *ante*, p. 973.

under age, his executors or administrators will be entitled immediately on his death (*g*).

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B., and A. dies before he attains his age, B. shall be entitled immediately; for he does not claim under A., but the bequest is a distinct substantive bequest, to take effect on the contingency of A. dying during his minority (*h*).

It should here be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the Will payment is postponed to a subsequent period, *e.g.*, till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and the Court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own (*i*). So, notwithstanding a legacy is directed to accumulate for a certain period, *e.g.*, until the legatee attains the age of thirty, yet if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one, to give a valid discharge (*k*).

A legacy of a defined fund vested absolutely is payable at twenty-one, notwithstanding payment is further postponed by the Will.

(*g*) *Cloberry v. Lampen*, 2 Freem. 25; *Crickett v. Dolby*, 3 Ves. 13. But if a legacy be payable out of land at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the Court will not direct the legacy to be raised until the time for payment arrives: *Gawler v. Standerwick*, 2 Cox, 15.

(*h*) *Laundy v. Williams*, 2 P. Wms. 478. But where legacies were given to A., B., and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if any of them should die, her legacy to go to the survivors; and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise: *Moore v. Godfrey*, 2 Vern. 620. See also, as to a legacy charged on land, *Feltham v. Feltham*, 2 P. Wms. 271.

(*i*) *Curtis v. Lukin*, 5 Beav. 147, 155, 156; *Rocke v. Rocke*, 9 Beav. 66; *Re Young's Settlement*, 18 Beav. 199.

(*k*) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240; *Greet v. Greet*, 5 Beav. 123; *Re Colson's Trusts*, Kay, 133, 141; *Re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, Johns. 265; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Holloway v. Webber*, L. R. 6 Eq. 523; *Re Wrey*, 30 C. D. 507; *Gott v. Nairne*, 3 C. D. 278; *Harbin v. Masterman*, [1894] 2 Ch. 184; *Wharton v. Masterman*, [1895] A. C. 186, where the legatee was a charity; *Re Couturier*, [1907] 1 Ch. 470; *Re Nunburnholme*, [1912] 1 Ch. 489. The Accumulations Act, 1800, known as the Thellusson Act (39 & 40 Geo. III. c. 98) provides (stated shortly) that no person by deed

Laches by neglect to invest legacies directed to be laid out in stock.

Where, in the administration of an estate, a Court of Equity decrees the payment of legacies which by the Will are directed to be invested in stock, it is immaterial whether the executor might or might not have been able, with reasonable diligence, to provide for the legacies at an earlier period, in order to fix him with such amount of stock as at the earlier period might have been purchased with the legacy: And the reason, probably, is, that the difficulty and expense which would attend such an inquiry in the case of an executor, make it more convenient in practice that the legacy should be provided for in money at the time of the administration by the Court, without reference to the price of stocks: But where a legacy is given by a Will to a trustee, who is not an executor, and he is directed to invest it immediately upon receiving it in the purchase of stock, and he receives it from the executor, and instead of investing it keeps it in his own hands, his conduct is a plain breach of trust, and he is clearly answerable to his *cestui que trust* for any loss

or Will, &c., shall settle or dispose of any real or personal property in such manner that the rents or produce shall be accumulated for a longer period than the life of the settlor or twenty-one years after his decease; or during the minority of any party living at his decease; or the minorities of persons beneficially entitled. Any other direction shall be void and the rents, &c., shall, so long as the same shall be directed to be accumulated contrary to the Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. Sect. 2 excepts from the Act any provision for payment of debts, or for raising portions for children, or touching the produce of timber, and sect. 3 excepts dispositions of heritable property in Scotland. By the Accumulations Act, 1892 (55 & 56 Vict. c. 58), no person shall, after the passing of this Act, settle or dispose of any property in such manner that the income shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the income so directed to be accumulated. Although the Will contains no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given, the case falls within the Act: *Tench v. Cheese*, 6 De G. M. & G. 453. The Thellusson Act cannot be applied so as to accelerate the enjoyment of any gift or disposition contained in a Will: *Green v. Gascoyne*, 4 De G. & S. 565. As to income the accumulation of which is prevented by the Thellusson Act, see *Weatherall v. Thornburgh*, 8 C. D. 261; *Re Parry*, 60 L. T. 489; *Re Travis*, [1900] 2 Ch. 541; *Re Hawkins*, [1916] 2 Ch. 570; *Re Garside*, [1919] 1 Ch. 132. As to what is a "portion" within the meaning of sect. 2 of the same Act, see *Beech v. Lord St. Vincent*, 3 De G. & Sm. 678; and *Re Stephens*, [1904] 1 Ch. 322. A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within sect. 2 of the Thellusson Act: *Re Heathcote*, [1904] 1 Ch. 826.

by a subsequent rise in the price of stock: There is in such a case no difficulty or inconvenience in ascertaining the extent of the loss: And accordingly, when an executor, who happens also to be named a trustee of a legacy to be laid out in stock, has fully administered the estate, and assented to the legacy, and retains the legacy in his hands, not as assets of the testator, but as trustee of the legacy, then the principles which would apply to another trustee must apply to him: He is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee (*l*).

It is necessary, in conclusion, to advert to the subject of the payment of legacies which by the Will are made payable *in futuro*. Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go into the Court of Chancery, and pray that a sufficient sum be set apart to answer the legacy when it shall become due (*m*).

Appropriation of legacies payable *in futuro*.

Thus, in *Ferrand v. Prentice* (*n*), a bill was filed by a legatee for the security of a legacy of 200*l.*, which the executor, the defendant, was directed by the Will to pay at the end of ten years after the death of the testator: The bill prayed that the defendant might admit assets and give security, or pay the money into the Bank: And, although no particular reasons were assigned, as wasting assets, or insolvency in the defendant, yet Sir Thomas Clark, M. R., decreed that the defendant should pay the money into the Bank, and that he should have the interest in the meantime; and that, at the end of the ten years, the principal should be paid to the plaintiff. So in *Walker v. Cook* (*o*), a legacy was left to one to be paid at the age of twenty-four: The legatee being only twelve years old, his father filed a bill that the legacy might be invested in the funds: And it was so decreed, though it was declared that the legatee was not entitled to the money before attaining the age of twenty-

(*l*) *Byrchall v. Bradford*, 6 Madd. 13; *S. C.*, *ibid.* 235, 240. See as to when an executor is *functus officio* and becomes a trustee, *Re Timmis*, [1902] 1 Ch. 176; *Solomon v. Attenborough*, [1912] 1 Ch. 451, 458; *Re Grosvenor*, [1916] 2 Ch. 375.

(*m*) By Lord Hardwicke, in *Phipps v. Annesley*, 2 Atk. 58. It is otherwise where the legacy is to be raised out of real estate: *Cawler v. Standerwick*, 2 Cox. 15.

(*n*) Amb. 273; *S. C.*, 2 Dick. 568; *S. C.*, cited by Lord Thurlow, 1 Bro. C. C. 105.

(*o*) Cited by Lord Thurlow in *Green v. Pigot*, 1 Bro. C. C. 105.

four. So in *Johnson v. Mills* (p) the sum of 2,000*l.* was left to the testator's daughter at twenty-one; and in default, to her child, and if no child, to one Mills: A bill was filed to secure the fund: which was opposed by the executrix, on the ground that there was no danger of insolvency in the case: But Lord Hardwicke said, "I thought nothing was better settled than what is now endeavoured to be made a question; that whenever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands: Nor is there any more useful part of the jurisdiction of this Court in the administration of assets: therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so that it might fall into the bulk of the estate: and this is done to secure the interest of every party, of course, as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets" (q).

Again, in *Green v. Pigot* (r), a legacy of 5,000*l.* was given to a female infant, to be paid at twenty-one or marriage, with interest at four per cent.; but if she died before, it was directed by the Will that the legacy should sink into the residue: And Lord Thurlow ordered the sum of 5,000*l.* (with interest at four per cent. from the end of a year after the testator's death) forthwith to be laid out in three per cents. in the name of the Accountant-General, upon the trust and subject to the contingencies in the testator's Will: And his Lordship said that he did not see any distinction as to the legacy being contingent or merely future (s). So in *Carey v. Askew* (t), the testator

(p) 1 Ves. Sen. 282; *S. C.*, cited by Lord Thurlow, *nomine Johnson v. De la Creuze*, 1 Bro. C. C. 105. The principle of this case is not, however, to be extended to cases of contingent legacies where the interest in the meantime does not go to the legatee: *per Vaughan Williams, L. J.*, in *Re Hall*, [1903] 2 Ch. 226, 232.

(q) But in *Re Braithwaite*, 21 C. D. 121, it was held that the rule that if personal property consisting of money or stock is limited to A. for life, and after his death to B. absolutely, it will be ordered into Court for administration in an action by B. for the purpose is not absolute, and will only be enforced as against A. where there is reasonable ground, such as danger to the fund, for the application.

(r) 1 Bro. C. C. 103.

(s) See *Pullen v. Smith*, 5 Ves. 21, for an instance of an appropriation on the application of a contingent legatee. See also the observation of Buller, J., in *Hutcheson v. Hammond*, 3 Bro. C. C. 144, 145.

(t) 2 Bro. C. C. 58.

gave 15,000*l.* to his daughter, to be paid to her at twenty-one or marriage, with interest in the meantime; but if she died before, to sink: And Lord Kenyon, M. R., held, that the money must be immediately raised and appropriated, although the child might not live to attain her age, or day of marriage (*u*).

However, it would appear from the case of *Webber v. Webber* (*x*), that where a legacy of a certain sum of money is given, on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee, on his giving satisfactory security: The principle on which this was so ruled was, that the legatee being entitled to receive a certain sum in money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock (*y*).

When the appropriation is made under the direction of the Court, it would seem, according to the opinion of Lord Thurlow, in *Green v. Pigot* (*z*), that the legatee must bear any losses and enjoy any additions which the fluctuation of the price of stock may cause: But in *Sitwell v. Bernard* (*a*), Lord Eldon said, that there had been other cases since *Green v. Pigot*, in which it had been held not to be the legitimate effect of appropriation to give a larger interest than if there had been no appropriation: However, in the subsequent case of *Burgess v. Robinson* (*b*), where there had been an investment of 500*l.* in stock, in pursuance of an order made on the application of a trustee, without the consent of the plaintiff, who was entitled thereto, Sir William Grant held that the investment of the money was an appropriation by which all parties were bound, and therefore that the plaintiff was entitled to the stock, and all the benefit accrued from the rise thereof (*c*).

(*u*) See also *The Governesses Benevolent Institution v. Rushbridger*, 18 Beav. 467.

(*x*) 1 Sim. & Stu. 311.

(*y*) By Sir John Leach, V.-C., 1 Sim. & Stu. 312, 313; and see *King v. Maccott*, 9 Harc. 692; *Re Hall*, [1903] 2 Ch. 226; *Re Salaman*, [1907] 2 Ch. 46.

(*z*) 1 Bro. C. C. 105, 106.

(*a*) 6 Ves. 543.

(*b*) 3 Meriv. 9, 10.

(*c*) See also *Rock v. Hardman*, 4 Madd. 254, by Sir John Leach, V.-C.; *Kimberley v. Tew*, 4 Dr. & W. 139, 149; and cf. *Re Oswald*, [1920] W. N. 22.

Distinction
between a
contingent
legacy,
without
interest in the
meantime,
and a legacy
payable *in
futuro*, as to
appropriation.

In *Re Hall* (d), it was held by the Court of Appeal that when a cash legacy is given upon the happening of a contingency, *e.g.*, the attainment of twenty-one years of age by the legatee, but without interest in the meantime, the executor is not entitled to set apart and invest the amount and appropriate the investment to satisfy the legacy, so that in case, on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss. In the course of his judgment, Vaughan Williams, L. J., says, "I think there has been some little confusion in the argument between a legacy payable *in futuro* and a contingent legacy. If there is a vested legacy which will certainly be payable *in futuro*, I take it the legatee has an absolute right to go to the trustee or executor and say, 'Although my legacy is payable *in futuro* it is a vested legacy, and I require you to invest the amount of it'; and not only would the legatee have the right to require that, but he could insist upon its being done; and when it was done that would be an appropriation in the strict sense of the word, and the gain or loss upon the investment (as the case might be) would go to or fall upon the legatee. And that is what I understand Lord Hardwicke to have meant when he said in *Johnson v. Mills* (e), 'I thought nothing was better settled than what is now endeavoured to be made a question; that whenever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands.' That, however, has no application to a case in which not only is the legacy contingent, but the interest in the meantime, until the happening of the contingency, does not go to the legatee, but remains part of the testator's estate. In *Green v. Pigot* (f), Lord Thurlow treated the legacy as vested and defeasible if the legatee did not attain twenty-one or marry. But interest was given to her in the meantime, and there was accordingly no difficulty in the executor making an appropriation, because the legatee might at the time be treated as owner of the investment, she taking the interest in the meantime. In the present case,

(d) [1903] 2 Ch. 226. See *Re Salaman*, *supra*; and *Re Kirkley*, *infra*.

(e) 1 Ves. Sen. 282.

(f) 1 Bro. C. C. 103.

however, the contingent legatee does not take the interest in the meantime, and that interest is part of the testator's estate, and in these circumstances I have not heard any authority cited which leads to the conclusion that the executors had any right to do more than as prudent executors to retain as part of the estate a sufficient sum to answer the legacy, if it should become necessary to do so by reason of the happening of the contingency. The executors would have to deal reasonably with that part of the estate, and in fact would have to invest it as part of the estate generally and not as appropriated to any particular purpose. I need not say more. There is no authority for the proposition that the executors are entitled at their own will to take a part of the estate which they are holding to answer the contingent legacy as a *cestui que trust*. As to what might be done by an order of the Court or by arrangement I do not say, and I need not inquire. All I do say is that the executors under this Will had no authority to make the appropriation which they did make, and that the loss by depreciation in value of the stock cannot fall upon the legatee. She is entitled to receive 1,000*l.* in full without any deduction" (*g*). This case was considered by Eve, J., in *Re Salomons* (*h*), where he held that executors could not appropriate an infant's legacy so as to free themselves and the residuary estate from liability, the only way to obtain this result being to pay the money into Court or to obtain the consent of the Court to appropriation in an administration action (*h*).

When a testator bequeaths legacies and annuities, and then gives the residue of his property, after payment of his debts, funeral and testamentary expenses, legacies and annuities, the annuitants are not entitled as a matter of right to have the estate converted, and a sum sufficient to answer the annuity invested in such securities as the Court would approve for the investment of funds under its control; but they are entitled to have the annuities sufficiently secured, for instance, by a mortgage of real estate of the testator (*i*).

When a fund has been appropriated for the payment of an annuity given by Will, a question may arise whether the legatee is to suffer the loss consequent on the partial failure of the fund.

(*g*) *Re Kirkley*, 87 L. J. Ch. 247; and see *Re Rivers*, 1 Ch. 320.

(*h*) [1920] 1 Ch. 290.

(*i*) *Re Parry*, 42 C. D. 570; *Harbin v. Masterman*, [1896] 1 Ch. 351.

In cases where the annuity is a charge upon the whole personal estate, it seems clear that the executor cannot affect the legatee's right to the entire annuity by any appropriation (*j*). Thus in *May v. Bennett* (*k*), a testator having directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income: Those dividends were afterwards diminished by the conversion of the 5 per cents. into 4 per cents.: And Lord Gifford, M. R., held, that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. Again in *Davies v. Wattier* (*l*), a testator having directed an annuity to be paid out of his personal estate, a sum of 5 per cent. stock was, in the course of the cause, ordered to be set apart to answer the annuity: This fund having become insufficient for the purpose, by the conversion of the 5 per cents. into 4 per cents., the deficiency was directed by Sir John Leach, V.-C., to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled (*m*). But it may be otherwise where the appropriation is made in certain stock by the executor in conformity with the direction of the testator, so that the bequest may be regarded as a gift of the interest of the particular stock. Thus in *Kendall v. Russell* (*n*), a testator gave the yearly sum of 2,000*l.* sterling to his wife for her life, and after her decease, to his trustees upon the same trusts as after declared concerning the yearly sum of 3,000*l.*: He then gave

(*j*) *Gordon v. Bowden*, 6 Madd. 342. As to the right of trustees to retain surplus income to meet a possible deficiency of an annuity in future years, see *Re Platt*, [1916] W. N. 303.

(*k*) 1 Russ. Chan. Cas. 370. And this was adopted in the case of *Carmichael v. Gee*, 5 App. Cas. 588. Cf. *Harbin v. Masterman*, [1896] 1 Ch. 351.

(*l*) 1 Sim. & Stu. 463.

(*m*) See also *Boyd v. Buckle*, 10 Sim. 595.

(*n*) 3 Sim. 424. See also *Bague v. Dumergue*, 10 Hare, 462; *Baker v. Baker*, 6 H. L. C. 616, 628; *Hickman v. Upsall*, 2 Giff. 124. If the legatee of the annuity assents to the appropriation of some particular fund for the payment of it, the failure thereof, whether partial or total, would probably be at his risk: Lumley on Annuities, p. 298. But such assent must be clearly established: see *Arundell v. Arundell*, 1 M. & K. 316.

to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the 5 per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for her life, and, after her decease, for her children: The trustees invested 100,000*l.* 5 per cents., to answer the two yearly sums: The stock was afterwards converted into 4 per cents., whereby the dividends became insufficient to pay the yearly sums: And Sir L. Shadwell, V.-C., held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. Where, although the requisite amount of stock has been appropriated in the name of the executor, he afterwards sells it out and wrongfully applies the proceeds to his own use, he and all those who may stand in his place, including a claimant by assignment from him for valuable consideration, even when made before the *devastavit*, of his share in the testator's residuary estate, are precluded from contending that due provision was made for the annuity; and consequently the deficiency caused by the executor's *devastavit* must be supplied out of his share of the residue (*o*).

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings, before a foreign tribunal, which are not likely to be speedily settled, the Court, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in Court to answer pecuniary legacies subject to such demands as creditors may eventually establish (*p*).

Appropriation where the amount of the testator's debts is contingent.

SECTION V.

To whom Legacies are to be paid.

This inquiry is one of great importance to an executor, who must be careful to pay legacies into the hands of those who have authority to receive them.

If a legacy be given to A., to be divided between himself and his family, and the executor pays the legacy to A., it is

Legacy to A. and his family.

(*o*) *Morris v. Livie*, 1 Y. & C. Ch. C. 380; *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Doering v. Doering*, 42 C. D. 203; *Re Dacre*, [1916] 1 Ch. 344. Inasmuch as real estate, since the Land Transfer Act, 1897, vests in the legal personal representative, there would seem to be no difference, so long as the real estate continues so vested, between a person deriving title under a residuary legatee and a person deriving title under a residuary devisee in this respect. Cf. *Fox v. Buckley*, 3 C. D. 508; *Re Brown*, 32 C. D. 597.

(*p*) *Thomas v. Montgomery*, 1 Russ. & M. 729, *ante*, p. 1115.

well paid to discharge the executor (*q*). So if one was to give a legacy to the senior Six Clerk, to be divided among himself and the other Six Clerks, it would be well paid to the senior (*r*).

Infant
legatee.

It is a general rule, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant, or to the father, or any other relation of the infant, on his account, without the sanction of a Court of Equity (*s*): And even in the case of a legatee who has attained majority, payment to the father is not good, unless it be made by the consent of the legatee, or confirmed by his subsequent ratification (*t*). It may happen that an executor has, with the most honest intentions, paid the legacy to the father of the infant; nevertheless he will be held liable to pay it over again to the legatee on his coming of age: And although such cases have been attended with many circumstances of hardship on the executor, yet he has been held responsible, on the policy of obviating a

(*q*) *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142. See the cases collected *ante*, p. 893.

(*r*) *Cooper v. Thornton*, 3 Bro. C. C. 99, by Lord Alvanley.

(*s*) *Dagley v. Tolferry*, 1 P. Wms. 285; *S. C.*, *nomine Doyley v. Tolferry*, 1 Eq. Cas. Abr. 300, pl. 2; *S. C. nomine Dawley v. Ballfrey*, Gilb. Eq. Rep. 103. A contrary doctrine was acted upon in the early case of *Holloway v. Collins*, 1 Chan. Cas. 245; *S. C.*, 1 Eq. Cas. Abr. 303, pl. 1. In *Walsh v. Walsh*, 1 Drewr. 64, Kindersley, V.-C., under special circumstances, ordered an infant's legacy of small amount to be paid to the father. In *McCreighton v. McCreighton* (1849), 13 Ir. Eq. 314, the Lord Chancellor of Ireland held, with regard to the power of testamentary guardians appointed under the statute 14 & 15 Car. II. c. 19 (Ir.), analogous to the statute 12 Car. II. c. 24 (Eng.), that such a guardian was entitled, by force of the power and authority given by the statute, to give a discharge for the general personal estate of the infants; and consequently, where an infant was entitled to a vested legacy, payment thereof during his minority by the executor to the testamentary guardian was valid. In *Re Cresswell* (1881), 45 L. T. 468, Fry, J., held that a testamentary guardian is not entitled, as such, to obtain payment out of Court of funds, the property of the infant ward, which have been paid into Court under the Legacy Duty Act (36 Geo. III. c. 52), and his Lordship added: "I have no intention of interfering with the decision of Brady, L. J., in *McCreighton v. McCreighton* (*ubi supra*), who had not there to deal with the statute, the terms of which compel me to refuse the application." It would be unwise at the present day for an executor to incur risk in paying a legacy of an infant to his testamentary guardian. The only way to free himself and the residue from liability is to pay the money into Court: *Re Salomons*, *infra*.

(*t*) *Cooper v. Thornton*, 3 Bro. C. C. 97, by Lord Alvanley. If a suit was instituted in the Spiritual Court for an infant's legacy by the father, to have it paid into his hands, an injunction or prohibition would have been granted: *Rotherham v. Fanshaw*, 3 Atk. 629.

practice so dangerous to the interests of infants, and so naturally productive of domestic discord (*u*).

But if a Court of Equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executor during his minority, it will hold him estopped from claiming a repayment (*v*). Accordingly, Lord Alvanley observed (*w*), with reference to the case of *Dagley v. Tolferry* (*x*), "Although the son acquiesced a great length of time, still it was competent to him, or his representatives, to demand it; because a contrary determination would encourage such payment, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father: and that I take to be the ground on which Sir John Trevor and Lord Cowper went: *and if the legatee did not stand in that relation to the person to whom the legacy was paid*, the bill would be dismissed." But the intention, on the part of the legatee, to confirm such application must be unequivocal (*y*).

Confirmation by legatee after attaining majority of previous application of legacy.

When the direction to the executor is not to pay the legacy to the child, but the bequest is made to a trustee for him, the executor will be justified in paying the money to the person so appointed (*z*). Hence, if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money; and his receipt will be a good discharge to the executors (*a*). It seems clear, that the direction for payment to the trustee must appear upon the face of the Will, and cannot be proved by parol evidence (*b*).

Payment of bequest to a trustee for an infant.

But the executor may discharge himself from all responsibility, with respect to the payment of legacies due to infants, by virtue of the Trustee Act, 1893 (which repealed sect. 32 of the statute 36 Geo. III. c. 52), under which provision is made for payment thereof, after deducting the duty chargeable thereon, into Court. And this seems the proper course to pursue, where legacies carry interest in order to free the residue and stop

Trustee Act, 1893, s. 42.

(*u*) Toller, 314; *Dagley v. Tolferry*, *ubi supra*.

(*v*) 1 Rep. Leg. 771, 3rd edit.

(*w*) 3 Bro. C. C. 97.

(*x*) *Ubi supra*.

(*y*) See *Lee v. Brown*, 4 Ves. 362.

(*z*) 1 Rep. Leg. 771, 3rd edit.

(*a*) *Cooper v. Thornton*, 3 Bro. C. C. 96; *Robinson v. Tickell*, 8 Ves. 142, *ante*, p. 1136.

(*b*) *Cooper v. Thornton*, 3 Bro. C. C. 97.

the payment of interest (*c*). Indeed this seems to be the only way to free the residue short of an administration action (*d*).

By sect. 42 of the Trustee Act, 1893, trustees or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court, and the same shall, subject to the Rules of Court, be dealt with according to the order of the High Court. Under sect. 50, the expressions "trust" and "trustee" include the duties incident to the office of personal representative of a deceased person (*e*).

Before the passing of 36 Geo. III. c. 52, if a suit was commenced to secure a legacy to an infant, the costs were allowed out of the testator's general assets: But after the statute was passed, Lord Alvanley took occasion to say (*f*), that in future he should not give the costs in such a case; for since the statute, the executor had nothing to do but under that Act to pay the legacy into Court; and then he had done: and the infant, when of age, might petition for it.

The executor was not bound to pay the legacy into the Bank, under the statute, till the expiration of a year from the testator's death (*g*).

When the executor may allow maintenance out of a legacy :

(a) out of capital :

It must also be observed that generally an executor cannot, without risk, pay any part of a legacy bequeathed to an infant, either to the infant or to any person for his use. Therefore the executor is not, as a rule, justified in applying any part of the capital of the legacy for the maintenance of the child (*h*), nor indeed of the interest except under the conditions hereinafter appearing. But the Court will in some cases, upon application being made for its sanction, authorise the application of part of the capital for maintenance, if either the total fund is small (*i*), or there is no other means of providing for the support of the child (*k*). And it appears that the executor may do the same

(*c*) *Re Salaman*, [1907] 2 Ch. 46.

(*d*) *Re Salomons*, [1920] 1 Ch. 290.

(*e*) Cf. sect. 25 (3).

(*f*) *Whopham v. Wingfield*, 4 Ves. 630. See *Wells v. Malbon*, 31 Beav. 48.

(*g*) Toller, 319.

(*h*) *Davies v. Austen*, 3 Bro. C. C. 178; 1 Ves. 247; *Carmichael v. Wilson*, 3 Moll. 79; *Robison v. Killey*, 30 Beav. 520. See also *post*, p. 1149.

(*i*) *Barlow v. Grant*, 1 Vern. 255; *Ex parte Green*, 1 Jac. & W. 253. Compare *Robison v. Killey*, *ubi supra*.

(*k*) *Harvey v. Harvey*, 2 P. Wms. 21; *Prince v. Hine*, 26 Beav. 634. Compare *Re England*, 1 R. & M. 499.

on his own authority, if he does no more than the Court would have directed if it had been resorted to in the first instance (*l*). For the principle is established, that if an executor do, without application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application (*m*). At the same time it is the prudent course for an executor in every case to apply to the Court before devoting any part of the capital of a legacy to maintenance (*n*).

The power of applying the interest of a legacy to the maintenance of an infant legatee is now principally regulated by the Conveyancing Act, 1881 (*o*). This Act repealed sect. 26 of Lord Cranworth's Act (*p*), which dealt with the same matter in almost identical terms (*q*). By the Conveyancing Act, 1881 (sect. 43), it is provided as follows:—

(1.) Where any property is held by trustees in trust for an infant (*r*), either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the

(*l*) *Rop. Leg.* 768, 3rd edit.

(*m*) *Lee v. Brown*, 4 Ves. 362, 369, *per* Lord Alvanley; *Prince v. Hine*, 26 Beav. 634.

(*n*) For the manner of application, see *post*, p. 1150.

(*o*) 44 & 45 Vict. c. 41, s. 43.

(*p*) 23 & 24 Vict. c. 145, s. 26.

(*q*) This section provided: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently, they may at their sole discretion pay to his guardians, or otherwise apply for his maintenance or education, the whole or any part of the income of the property; and they shall accumulate the residue of such income by way of compound interest, for the benefit of the person who shall ultimately be entitled to the property, unless it appears to them expedient to apply such accumulations as if the same were part of the income arising in the then current year." By sect. 31, these provisions only applied to instruments executed after August 28, 1860. The principal differences between sect. 25 of this Act and sect. 43 of the Conveyancing Act, 1881, are pointed out in *Re Dickson*, 28 C. D. 291; 29 C. D. 331 (C. A.).

(*r*) Where a residue is bequeathed to an infant and the residue has been ascertained, the executor is trustee of such residue for the infant within the meaning of this section: *Re Smith*, 42 C. D. 302; and so is an administrator with the Will annexed: *Re Adams*, [1906] W. N. 220.

(b) out of income of fund;
(1) by statute:

same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property (s) from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention (t) is not expressed in the instrument under which the

(s) In *Re Scott*, [1902] 1 Ch. 918, Buckley, J., expressed the opinion that in sub-sect. 2 the word "property" does not mean *corpus*, but the income from the setting aside and investing of which the accumulations arise, and that the words of sub-sect. 2 should be read thus: "and shall hold those accumulations for the benefit of the person who, in the events which happen, becomes entitled to the property (namely, the income) from the accumulation of which the accumulations arise." This is a decision that, where a contingent life interest is given by a testator to his child in a share of residuary property, the legatee, on the happening of the contingency, will become entitled to the income which has been accumulated in the meantime. The Court of Appeal, however, in *Re Bowlby*, [1904] 2 Ch. 685, held that *Re Scott* was wrongly decided, and that, in the case of a contingent legacy by a father to an infant child, the infant is entitled, not to interest on the legacy, as such, but only to maintenance, although for the purpose of creating a fund and as a matter of convenience, the Court has been in the habit of allowing an annual sum at the rate of 4 per cent. upon the amount of the legacy, and that, should there be a surplus during the infancy, not covered by any order of Court or not received for maintenance, the surplus is regarded, according to the practice of the Court, as an accretion to the *corpus* of the contingent legacy. Vaughan Williams, L. J., however, although feeling bound to follow the practice of the Court, yet, on reviewing the authorities, expressed the opinion that to give the accumulations to the remaindermen is altogether outside the intention imputed to the testator.

(t) A direction to accumulate the income of a fund given contingently to a class of infants and to pay the same to them as and when their presumptive shares become payable, is not the expression of a "contrary intention": *Re Thatcher's Trusts*, 26 Ch. D. 426; *Re Cooper*, [1913] 1 Ch. 350. If a Will expressly gives the intermediate income to the residuary legatee, that may amount to the expression of a contrary intention: *per Kay, J.*, in *Re Dickson*, 28 Ch. D. at p. 297. But there is no need to look for a contrary intention in such a case, since the Act has no application to income to which the infant cannot become entitled, and the application of the Act is equally prevented whether the interest of the infant in the income is negated by the income being expressly given to some other person, or whether, by construction of law, the intermediate income falls into the residue or goes to the next of kin as upon an intestacy. See *infra*. If a share

interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provision therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

It was held (*u*) that the corresponding section of Lord Cranworth's Act applied only to cases in which the legacy was given to the infant either absolutely, or contingently on the infant attaining twenty-one or on some event happening or not happening, and not to cases in which the gift was absolute in the first instance, but liable to be defeated on the infant legatee not attaining twenty-one, or on the happening or not happening of some future event. It has also been held, both under Lord Cranworth's Act and under the Conveyancing Act, that no payments for maintenance can be made out of the income of a fund, unless the interest would go with the capital so as to belong to the infant on the gift of the capital becoming absolute (*x*). It

of residue is given absolutely to an infant contingently on attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and sect. 43 will apply. But if the infant only becomes tenant for life of the share of residue, with its accretion on attaining twenty-one, the case does not fall within the language of sect. 43, as interpreted by the Court of Appeal in *Re Dickson*, 29 Ch. D. 331: *per* Stirling, J., in *Re Bowlby*, *ubi supra*; *Re Eyre*, [1917] 1 Ch. 351. In *Re Humphreys*, [1893] 3 Ch. 1, the Court of Appeal held that the gift of an immediate vested life interest in a share of residuary estate was an expression of a "contrary intention" within sub-sect. 3.

(*u*) *Re Buckley's Trusts*, 22 Ch. D. 583.

(*x*) *Re Dickson*, 28 Ch. D. 291; 29 Ch. D. 331 (under the Conveyancing Act); *Re George*, 5 Ch. D. 837 (under Lord Cranworth's Act). In *Re Cotton*, 1 Ch. D. 232, maintenance was allowed under Lord Cranworth's Act, and the effect of the Act considered by Jessel, M. R.; see also *Re Bowlby*, [1904] 2 Ch. 685. A future devise of lands does not carry the intermediate rents, and maintenance cannot be ordered out of such rents: *Re Eddel's Trusts*, L. R. 11 Eq. 559; *Re Averill*, [1898] 1 Ch. 523; cf. *Re Stevens*, [1915] 1 Ch. 429; but if you find a testator mixing a gift of realty and personalty in the same clause, this was held by Lord Eldon to justify the conclusion that the testator intended that the same rule should operate on both, and that the intermediate rents of realty and the intermediate income of personalty should (when not expressly disposed of) be both dealt with according to the rule with regard to personalty: *Genery v. Fitzgerald*, Jac. 468, 470 (*Re Burton's Will*, [1892] 2 Ch. 38; *Re Adams*, [1893] 1 Ch. 329); and this rule has been extended to cases where the realty and personalty are not given by the same clause, and where the funds are not, strictly speaking, mixed or blended, but merely given for the same object: *Re Dumble*, 23 Ch. D. 360; *Bellairs v. Bellairs*, L. R. 18 Eq. 510; and compare *Hodgson v. Bective*, 1 H. & M. 376. In *Re Holford*, [1894] 3 Ch. 30 (overruling *Re Jeffery*, [1891] 1 Ch. 671), a testator gave his residuary personalty upon trust to divide it equally

is also clear that, if the gift depends on a further contingency, so that the infant legatee will not necessarily become entitled on attaining twenty-one or sooner, this section of the Conveyancing Act does not apply, since the section only applies to property to which the infant is entitled either absolutely or contingently on attaining twenty-one, or on the occurrence of an event *before his attaining that age*, and the infant in the case here supposed may attain twenty-one, and yet never become entitled (y).

(2) independently of statute.

Under such circumstances as are indicated in the last paragraph, and in other cases to which the Conveyancing Act does not apply, the old rules of equity with regard to payment of income by way of maintenance still hold good. The general principle was that payments may be made for maintenance out of the income of a legacy only when the legacy is vested in possession (z), not when it is vested and payable *in futuro* (a),

between such of the children of A. living at the testator's death as should attain twenty-one. At the testator's death A. had six children, all infants. The Will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, and also, until another child attained twenty-one, the income of the remaining five-sixths:—Held, by the Court of Appeal (affirming the decision of Chitty, J.) that the income of the remaining five-sixths did not belong to the child who had attained twenty-one, but was applicable, under the Conveyancing Act, 1881, s. 43, for the maintenance of the five infants. Lindley, L. J., at page 47, says: "It is true that, if all the members of the class had died under twenty-one, there would have been an intestacy, and the next of kin would have taken the residue; but, notwithstanding that possibility, the Act authorises the application of the income towards the maintenance of the members of the class whilst all are under age. This was decided, and quite rightly, in *In re Adams*, [1893] 1 Ch. 332. So although, if those children who are still under age should die under twenty-one, the child who has attained twenty-one will take their shares, still the Act authorises the application for their maintenance of the income of their contingent shares, for that income contingently belongs to them. This conclusion is perfectly consistent with the decision of this Court in *In re Dickson*, 29 Ch. D. 331; for the interest on the legacy there in question did not follow the legacy before it became vested, but was payable to persons other than the legatee. The Court held that sect. 43 did not authorise the maintenance of an infant out of income which did not, and never could, belong to him; but the Act was clearly intended to authorise, and does authorise, his maintenance out of income which will become his if he lives long enough to acquire a vested interest in the property from which the income arises." The principle of *In re Holford* was followed in *Re Williams*, [1911] 1 Ch. 441, and was treated by North, J., in *Re Jeffery*, [1895] 2 Ch. 577, as applicable to the case of a class which is capable of increase, no less than to the case of a class which is not so capable.

(y) *Re Judkin's Trusts*, 25 Ch. D. 743.

(z) *Collis v. Blackburn*, 9 Ves. 470; *Stretch v. Watkins*, 1 Madd. 253. For the question what legacies are vested in possession, see Pt. III. Bk. III. Ch. II. § v.

(a) *Descrambes v. Tomkins*, 4 Bro. C. C. 149, n. See as to the

nor when it is contingent (*b*). If the gift is in the first instance absolutely vested in possession, it is immaterial that it is liable to be defeated (*c*) on the legatee not attaining twenty-one, or on the happening or not happening of any future event, unless there is also a direction to postpone payment (*d*). It may be stated generally that, if the income as it accrues from year to year becomes the infant's property absolutely, then the income or part of it may be applied to maintenance; otherwise not. It is hardly necessary to add that an executor must be careful not to pay money for the maintenance of an infant until it is clear that, on the final settlement of all accounts relating to the testator's estate, there will be a clear fund out of the income of which maintenance can be provided (*e*).

The exceptions to the above general rule, as well as the rule itself, depend on the well-recognised principle that every Will must be interpreted according to the intention of the testator as shown by the Will. Accordingly, the gift of a legacy not vested in possession carries with it the right to intermediate maintenance whenever the Will, either expressly or by implication, authorises the provision of maintenance. The testator's intention that the legatees shall be maintained out of the property bequeathed to them may be inferred from a gift over of the interest or from other circumstances (*f*). In two classes of cases a rule of construction has grown up by which such an intention is regularly implied, in the absence of directions to the

Exceptions to
general rule.

question whether a deferred legacy carries interest in the meanwhile by reason of its severance from the rest of the testator's estate, *Festing v. Allen*, 5 Hare, 575; *Re Judkin's Trusts*, 25 Ch. D. 743, 747; *Re Inman*, [1893] 3 Ch. 518; *Re Clements*, [1894] 1 Ch. 665; and *post*, p. 1158; and as to the applicability towards maintenance of intermediate income until the legatees attain a vested interest, where the property bequeathed is so severed, see *Re Woodin*, [1895] 2 Ch. 309; *Re Clements, ubi supra*; *Re Bowlby*, [1904] 2 Ch. 685; and cf. *Hanson v. Graham*, 6 Ves. 239, 249; *Mitchell v. Bower*, 3 Ves. 283, 288.

(*b*) *Butler v. Freeman*, 3 Atk. 58; *Gotch v. Foster*, L. R. 5 Eq. 311. But this must be limited to the case where the legacy is of capital, for where the contingent legacy is a legacy of capital and accumulated interest, or of interest with accumulations, maintenance may, it would seem, be allowed: *Re Wells*, 43 C. D. 281.

(*c*) It will be remembered, however, that trust property in which the infant has a defeasible interest is not within the statutes, and therefore that it is not under the statutes, but *dehors* them that maintenance in such a case is allowed.

(*d*) *Taylor v. Johnson*, 2 P. Wms. 504. See also *Re Buckley's Trusts*, 22 Ch. D. 583, and the chapter on Interest, *post*, p. 1161. Maintenance may be allowed out of any interest to which the infant is entitled.

(*e*) *Warter v. Anon.*, 13 Ves. 92; *Batt v. Anns*, 11 L. J. Ch. 52.

(*f*) *Sandars v. Millar*, 25 Beav. 154.

First class of exceptions.

contrary. The first of these classes comprises the cases in which the donor was the father of the legatee or stood *in loco parentis* towards him. In that case the executor may allow maintenance out of the income of a legacy, even though contingent (*g*), or vested and payable *in futuro* (*h*). It is presumed that the parent intended to provide for his children's support during infancy. But this exception holds good only when the testator has provided no other means of maintenance for the children. For if he has provided any other means of maintenance, however small, the presumption of intention is rebutted, and the Court will authorise no further allowance, unless indeed the legacy be vested (*i*). It should be noticed that this rule of construction relating to legacies given by persons *in loco parentis* has not been extended to legacies given by husbands to wives, or given to any other relations than children, unless in fact the testator stood towards them *in loco parentis* (*j*). Nor does the rule extend to cases where the legacy is made contingent upon an event having no reference to the infancy of the legatee, as where a legacy is given to a child on attaining the age of twenty-five or thirty (*k*).

Second class of exceptions.

The second class of exceptions, in which maintenance may be allowed out of legacies not vested in possession, comprises cases in which a legacy is given contingently to members of a class of infants in either of the following cases. (1) If it is inevitable that one or more members of the class will ultimately take (*l*),

(*g*) *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369. The rule does not apply where the parent is the mother, unless she is actually *in loco parentis*: *Re Eyre*, [1917] 1 Ch. 351.

(*h*) *Green v. Belcher*, 1 Atk. 507. In the case of a legacy to a child, let the testator give it how he will, either at twenty-one or marriage, or payable at twenty-one or marriage, and the child has no other provision, the Court will give interest by way of maintenance, for it will not presume a father so unnatural as to leave a child destitute: *Heath v. Perry*, 3 Atk. 101; *Crickett v. Dolby*, 3 Ves. 10.

(*i*) *Mitchell v. Bower*, 3 Ves. 283; *Hearle v. Greenbank*, 3 Atk. 716; *Wynch v. Wynch*, 1 Cox, 433; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Re George*, 5 C. D. 837; *Re West*, [1913] 2 Ch. 345. See *post*, p. 1160. In *Re Moody*, [1895] 1 Ch. 101, the Will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions of sect. 43 of the Conveyancing Act, 1881, were applicable; and Kekewich, J., held that reading sect. 43 into the Will, there was nothing in the Will to displace the application of the general rule applicable to legacies to infant children, and, accordingly, that the legacies to the son and daughter respectively carried interest as from the death of the testator. See *Re Abrahams*, *infra*.

(*j*) See *post*, p. 1155.

(*k*) *Re Abrahams*, [1911] 1 Ch. 108.

(*l*) *Haley v. Bannister*, 4 Madd. 275.

or (2) if the consent of all parties who may be ultimately interested in reversion or otherwise has been obtained. Speaking of the former of these cases, Lord Eldon says in *Ex parte Kebble* (m): "The cases after great struggle go this length, that where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship in case of the death of any under that age to the others, the chance of all taking or the survivor being equal, the Court takes the fund which belongs to all, and must go to all or some of them, and maintains them all out of the interest (n). But the principle cannot be applied where the legacy is not given absolutely to the children and the survivor, but in the case of the death of a child under twenty-one, there is a limitation to the issue; who, for that purpose, are as strangers: In this case, as in that, the property may never belong to any of the children" (o).

In the case of a legacy to a class contingently on attaining twenty-one, with benefit of survivorship to the rest in the event of any of the class dying before twenty-one, it is necessary to obtain the consent of any of the class who have attained twenty-one at the time when the payment for maintenance is desired, as well as that of the remaindermen (p). A direction to accumulate does not prevent the application of the income for maintenance (q). The possibility of future members of the class coming into existence does not prevent the allowance of maintenance for those who already exist (r). It would appear, from

(m) 11 Ves. 606.

(n) See also to the same effect the subsequent cases of *Marshall v. Holloway*, 2 Swanst. 436, and *Haley v. Bannister*, 4 Madd. 275.

(o) See *Errat v. Barlow*, 14 Ves. 202; *Marshall v. Holloway*, 2 Swanst. 436; *Ex parte Whitehead*, 2 G. & J. 249; *Turner v. Turner*, 4 Sim. 430; *Cannings v. Flower*, 7 Sim. 523.

(p) See *Simpson on Infants*, 2nd edit. 282; *Re Breed's Will*, 1 C. D. 226.

(q) *Mole v. Mole*, 1 Dick. 310; *McDermott v. Kealey*, 3 Russ. Ch. O. 264; *Martin v. Martin*, L. R. 1 Eq. 369; *Re Allen*, 17 C. D. 807; *Re Colgan*, 19 C. D. 305; *Re Thatcher's Trusts*, 26 C. D. 426; *Re Collins*, 32 C. D. 229. But where a testator has by his Will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the Court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance and education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance and education: *Re Alford*, 32 C. D. 383.

(r) See *per Lindley, L. J.*, in *Re Holford*, [1894] 3 Ch. at p. 46 and *Re Jeffery*, [1895] 1 Ch. 577.

some remarks of Sir G. Jessel, M. R., in *Re Breed's Will* (s), that a trustee or executor can never, on his own authority, make payments for maintenance in the case of a contingent gift to a class. In such a case it is certainly wiser to apply to the Court (t).

In order to provide maintenance for infants who are only contingently entitled upon attaining twenty-one, where there is nothing in the instrument to warrant maintenance, the course has been taken of effecting a policy of insurance, so as in the event of the infant dying under twenty-one to recoup the amount paid for maintenance and for the premiums upon the policy (u). To effect the same result the plan has also been adopted of charging other interests of an infant under the same Will to secure the recouping of sums to which the remainderman would be entitled if a contingency did not occur (x).

No maintenance allowed as a general rule in lifetime of father if he be of ability.

As a general rule the Court will not allow maintenance to an infant during the lifetime of the infant's father, if the father be of ability (y); and the executor will therefore pay it at his peril. It must be noticed that the father's ability must be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant, and the infant's needs must be considered with reference to the same standard of fortune and expectation. Thus in *Jervois v. Silk* (z), 1,200*l.* a year was allowed for maintenance although the father had an income of 6,000*l.* (a).

(s) 1 C. D. 226.

(t) See, however, where the property bequeathed is severed from the rest of the testator's estate, *Re Woodin*, [1895] 2 Ch. 309; *Re Clements*, [1894] 1 Ch. 665. See also sect. 43 of the Conveyancing Act, 1881; *Re Holford*, *ubi supra*; and *Re Jeffery*, [1895] 2 Ch. 577.

(u) *Re Arbuckle*, 14 W. R. 535; *De Witte v. Palin*, L. R. 14 Eq. 251. But see and compare *Re Hamilton*, 31 C. D. 291; *Cadman v. Cadman*, 33 C. D. 397; *post*, p. 1150.

(x) *Re Colgan*, 19 C. D. 305.

(y) *Butler v. Butler*, 3 Atk. 60; *Darley v. Darley*, 3 Atk. 399.

(z) *Coop.* 52.

(a) See also *Ex parte Williams*, 2 Coll. 740. Another exception to the general rule (*ante*, p. 1142) is where a testator has made a provision for a family, in the ordinary sense of the word, that is, the children of a particular *stirps* in succession or otherwise, but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate. It is assumed that he did not intend that the children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the Court has accordingly found, from the earliest times, that, where an heir-at-law is unprovided for, maintenance ought to be provided for him: *Revel v. Watkinson*, 1 Ves. Sen. 93; *Re Allen*, 17 C. D. 807; *Re Collins*, 32 C. D. 229. In

The amount allowed for maintenance depends partly on the age and quality of the infant, and partly on the amount of the fund. When the total fund is small, the whole income may be allowed (*b*). In other cases no rule has been established to fetter the discretion of the Court: a reference to the cases in the note (*c*) will show the proportion of the income that has in

Amount
allowed.

Re Colgan, 19 C. D. 305, the Court ordered a sum for maintenance of infants, entitled to contingent legacies and a share of residue, to be paid in excess of the sum mentioned in the Will of the testator, but charged the increased allowance on the interests ultimately coming to them under the Will in the residue of the testator's estate. It would seem, however, that the Court will not, where there is a trust for accumulation, order a sum to be paid for the education or maintenance of the person who is to succeed to the property in the absence of special circumstances: *Re Alford*, 32 C. D. 383. See also *Josselyn v. Josselyn*, 9 Sim. 63. Even where there is an express provision for the maintenance of an infant legatee, it has been laid down, that the Court will not permit such provision to be applied, if the parent be of ability to maintain the infant legatee: *Andrews v. Partington*, 3 Bro. C. C. 60; *S. C.*, 2 Cox, 223. But though a father is undoubtedly bound to maintain and educate his children, yet it is competent for him to contract that certain property shall be applied to those purposes. Accordingly, in *Meacher v. Young*, 2 M. & K. 490, Leach, M. R., held that, if under a marriage contract a fund has been settled upon trust for the children of the marriage at twenty-one, with a proviso that till their shares become payable the interest shall be applied towards their maintenance, the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. See also *Stocken v. Stocken*, 4 Sim. 152; 4 Myl. & C. 95; *Hawkins v. Watts*, 7 Sim. 199; *Thompson v. Griffin*, 1 Cr. & Ph. 317. And for a further relaxation of the rule, see *Hoste v. Pratt*, 3 Ves. 733; *Sisson v. Shaw*, 9 Ves. 285; *Maberly v. Turton*, 14 Ves. 499; *Brophy v. Bellamy*, L. R. 8 Ch. 798. If trustees refuse to exercise their discretion as to maintenance the Court will direct an inquiry: *Maberly v. Turton*, *ubi supra*. If, however, in an honest exercise of their discretion they refuse to contribute towards an infant's maintenance, the parents being in prosperous circumstances, the Court will not interfere and compel them: *Re Bryant*, [1894] 1 Ch. 324. Where there is a trust for maintenance in a settlement made upon marriage, and the father has maintained the children without calling for a contribution from the fund, he is in the position of purchaser of so much of the fund as it would have been proper to apply towards maintenance: but this rule applies only where the trust for maintenance is contained in an ante-nuptial marriage settlement which has a basis of contract to support it: *Re Kerrison's Trusts*, L. R. 12 Eq. 422; *Wilson v. Turner*, 22 C. D. 521.

(*b*) *Brown v. Smith*, 10 C. D. 377; *Re Hodges*, 7 C. D. 754, where the whole income was allowed by the Court contrary to the discretion of the trustees; *Re Roper's Trusts*, 11 C. D. 272, where the Court ordered the income to be paid to the father, the mother not having exercised a sound discretion. In *Tabor v. Brooks*, 10 C. D. 273, however, the trustees' discretion being "uncontrolled and irresponsible," the Court declined to interfere, there being no proof of *mala fides*, though of opinion the trustees were acting injudiciously in paying the whole income to the father.

(*c*) *Re Allsop*, C. P. O. 44; 7 L. J. Ch. 194; *Ex parte Williams*,

different cases been allowed. When the income fluctuates, the executor or trustee may generally calculate the amount to be allowed for maintenance on the basis of the average annual income. It has been held that the executor or trustee may, in some cases, make use of past accumulations for the purpose of maintenance; but this depends upon the wording and construction of the Will (*d*). In some cases the amount allowed for maintenance has been increased in order to provide for the parents or brothers or sisters of the infant, on the ground that it is for the infant's interest to have his near relations living in respectable circumstances (*e*). But this principle appears to apply only to such relations of the infant as reside in the same home with him (*f*).

Two or more funds applicable.

Where there are two or more funds applicable to the maintenance of an infant, the interest of the infant alone will determine which of the funds is primarily liable (*g*).

Allowances for past maintenance.

With regard to allowances for past maintenance of an infant, the general rule is that the Court will not direct an inquiry as to the propriety of an allowance to the *father* unless a special case be made (*h*). The Court, however, is not so strict in the matter of past maintenance in cases other than that of a father: thus an executor (not a father) may be allowed maintenance for the time past (*i*). This allowance, even in the case of a mother, must be limited to what has actually been expended upon such maintenance, though such expenditure may have been less than what the amount of the child's fortune would have justified (*k*). Where

2 Collyer, 740; *Nunn v. Harvey*, 2 De G. & Sm. 301; *Re Herons, Minors*, 3 Ir. Eq. Rep. 589; *Moor v. Lacy*, Macph. Inf. App. III.; *Barnes v. Ross*, [1896] A. C. 625. And see generally Simpson on Infants and Eversley on Domestic Relations.

(*d*) See Simpson on Infants, 2nd edit. 299.

(*e*) *Wellesley v. Beaufort*, 2 Russ. 28; *Lanoy v. Athol*, 2 Atk. 447; *Petre v. Petre*, 3 Atk. 511; *Allen v. Coster*, 1 Beav. 202; *Bradshaw v. Bradshaw*, 1 J. & W. 647; *Brown v. Smith*, 10 C. D. 377.

(*f*) See Simpson on Infants, 2nd edit. 302 *et seq.*; *Re Stables*, 21 L. J. Ch. 620. Compare, however, *Heysham v. Heysham*, 1 Cox, 179.

(*g*) *Foljambe v. Willoughby*, 2 Sim. & S. 165; *Lygon v. Coventry*, 14 Sin. 41; *Lucas v. King*, 11 W. R. 818; *Martin v. Martin*, L. R. 1 Eq. 369; *Re Wells*, 43 C. D. 281; *post*, p. 1160.

(*h*) *Ex parte Bond*, 2 My. & K. 439. For cases where the Court has found such special circumstances, see *Reeves v. Brymer*, 6 Ves. 425; *Sherwood v. Smith*, 6 Ves. 455; *Collis v. Blackburn*, 9 Ves. 470; *Maberly v. Turton*, 14 Ves. 499; *Stopford v. Lord Canterbury*, 11 Sim. 82; *Stephens v. Lawry*, 2 Y. & C. C. C. 87; *Carmichael v. Hughes*, 20 L. J. Ch. 396.

(*i*) *Sisson v. Shaw*, 9 Ves. 285; *Greenwell v. Greenwell*, 8 Ves. 194.

(*k*) *Bruin v. Knott*, 1 Phil. Ch. O. 572.

a mother made advances to a son during his minority, and not with the intention of afterwards claiming against his estate, it was held that there was no debt due to her for maintenance during such minority, and it was also held that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract; and as none had been shown the claim was disallowed (*l*). The case of *Brown v. Smith* (*n*), which was said by Brett, L. J., to be a case of past maintenance, seems in the circumstances of the case to have been rather in the nature of an application for an *ex post facto* approval by the Court of the sum paid as maintenance by the trustees to the mother of the infant. The principle that is to govern the allowance of past maintenance is laid down in that case by the learned Lord Justice as follows:—"Two questions arise, first, what would the Court have allowed, and, secondly, what amount has been expended. The Court cannot allow the trustee all he has expended, if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much."

As regards maintenance out of capital, it was said by Sir W. Grant (*n*), that it had very rarely occurred that the Court had broken in upon the capital of a legacy for the mere purpose of maintenance, though frequently for the purpose of putting out the child for life. However, in *Ex parte Green* (*o*), the petition prayed, that the principal of the sum of 298*l*. belonging to two infants might from time to time be applied to their maintenance: They had no other property, except some copyhold premises yielding about 6*l*. per annum: Sir Thomas Plumer said, that as the sum was so small, he would venture to make the order; and the order was made without a reference (*p*).

Maintenance
out of capital.

As regards maintenance out of real estate the Court has no jurisdiction to make an order having a wider effect than a judgment at law against the infant for necessities would have; and neither by a charge nor any scheme of insurance can any order be obtained where the infant's estate is not such as would be

Maintenance
out of real
estate.

(*l*) *Re Cottrell's Estate*, L. R. 12 Eq. 566.

(*n*) 10 C. D. 377.

(*n*) *Walker v. Wetherell*, 6 Ves. 474.

(*o*) 1 J. & W. 253.

(*p*) See *ante*, p. 1138.

bound by such a judgment (*q*). Therefore, although the expenses of past maintenance have been charged on the corpus of an estate to which an infant was entitled in fee simple in possession (*r*), yet the Court has no jurisdiction to charge such expenses on a reversionary interest in real estate (*s*), nor on the estate of an infant tenant in tail whether in possession or in remainder, and whether for past or future maintenance, nor on the base fee which might be created for the purpose (*t*). The Land Charges Act, 1900, has not altered the law in this respect (*u*).

Advancement

Similar principles to those regulating the power of executors to allow maintenance regulate their power to pay money for the purpose of the advancement of infants. The word "advancement" is commonly used, in contradistinction to maintenance, to describe payments made for the purpose of ensuring a permanent benefit to an infant, generally by establishing him in some profession or career. It can seldom, if ever, be advisable for the executor to make such a payment without the sanction of the Court, but the rule laid down by Lord Alvanley in *Lee v. Brown* (*x*) applies to advancement as well as to maintenance. The Court has less reluctance to break in upon the capital for the purpose of advancement than for the purpose of maintenance, since advancement is regarded as an investment of the infant's capital for his future benefit (*y*). It is to be noticed that the Conveyancing Act, 1881, applies only to payments out of the income of the infant's property. Advancement out of capital depends, therefore, on the old law as explained above with regard to maintenance. When advancement is expressly authorised by the Will, the executor may of course always apply the infant's property to that purpose, subject to the terms of the Will.

Mode of application for maintenance to Court.

Applications for the allowance of maintenance or advancement (except when there is an action or matter pending affecting the infant's property, when they should be made by summons in the action) are directed to be made at chambers in the Chancery

(*q*) *Re Hamilton*, 31 C. D. 291.

(*r*) *Re Howarth*, L. R. 8 Ch. 415.

(*s*) *Re Badger*, [1913] 1 Ch. 385.

(*t*) *Re Hamilton*, 31 C. D. 291; *Cadman v. Cadman*, 33 C. D. 397; *Re Hambrough*, [1909] 2 Ch. 620.

(*u*) *Re Badger*, [1913] 1 Ch. 385.

(*x*) 4 Ves. 362, *ante*, p. 1139.

(*y*) *Walker v. Wetherell*, 6 Ves. 474.

Division by an originating summons, which should be served on all persons interested in the fund out of which the maintenance or advance is to be paid and supported by an affidavit setting forth the facts on which the application depends (z).'

If a legacy were given to a married woman the rule at common law was that it must be paid to the husband (a). So where a legacy was given to a married woman, living separate from her husband, with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest (b). It was also adjudged, that if the husband and wife were divorced *à mensâ et thoro*, and a legacy were left to her, the husband alone might release it (c), and consequently, to him alone it was payable (d). But by the Matrimonial Causes Act (20 & 21 Vict. c. 85), which declares that thereafter a decree for a judicial separation shall take the place of divorce *à mensâ et thoro*, it is provided (sect. 25), that a wife who has been judicially separated from her husband shall from the date of the sentence be considered a *feme sole* in respect of any property which may come to or devolve upon her, and if she die intestate such property shall go as if her husband were then dead: and a wife who has obtained a protection order under section 21 is entitled to payment of a legacy bequeathed to her (e).

In case of
feme covert
legatee.

But this right of the husband to receive a legacy given to the wife was considerably modified by the doctrines of separate property and of the wife's equity to a settlement.

Even before the passing of the Married Women's Property Act, 1882, a legacy given to the *separate use* (f) of a married woman vested in her personally, and she alone could give a good discharge for it. The effect of this Act is that women married

Separate pro-
perty of wife.

(z) See R. S. C., Ord. 55, rr. 2 (12) and 25.

(a) See *ante*, p. 576.

(b) *Palmer v. Trevor*, 1 Vern. 261; Toller, 320.

(c) *Stephens v. Totty*, Cro. Eliz. 908.

(d) See *Green v. Otte*, 1 Sim. & Stu. 250.

(e) See *ante*, p. 47; *Re Kingsley's Trusts*, 26 Beav. 84; *Cooke v. Fuller*, *ibid.* 99. A fund given to trustees in trust for a wife did not, even before the Felony Act, 1870 (33 & 34 Vict. c. 23), vest in the Crown: *Re Harrington*, 29 Beav. 24.

(f) It should also be noticed that ever since the Married Women's Property Act, 1870, a legacy not exceeding 200*l.* given to a married woman has been her separate property, and her receipt was a good discharge for the same: 33 & 34 Vict. c. 93, s. 7. See *ante*, p. 576, n. (i).

after the commencement of the Act (1 Jan., 1883) are entitled to hold as their separate property any legacy, and that women married before the commencement of the Act are so entitled if their title to the legacy, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act. Where, therefore, a legacy is separate property either independently of or by reason of the Act, an executor must pay such legacy to the wife personally, and she alone can give a good discharge for it.

Where the
legatee is
abroad.

A difficulty may occur with respect to the payment of legacies, in cases where a legacy is given to a legatee who has been abroad, and not heard of for a long time.

In one case, a legatee having been abroad twenty-eight years, and not heard of for twenty-seven, the Court presumed him to be dead (*g*). And the same was done in a subsequent case (*h*), after an absence, without any tidings, of sixteen years.

But in some cases the Court has required that the parties entitled to the legacies in the event of the death of the legatees should give security to refund, in case the legatee should return (*i*).

However, the executor may avoid all responsibility by pursuing the provisions of the Trustee Act, 1893 (*k*).

Where legacy
has been
assigned.

An executor who receives notice that a legatee has charged his legacy is bound to withhold all further payment to him; and the executor can create no new charges or rights of set-off after that time (*l*).

(*g*) *Dixon v. Dixon*, 3 Bro. C. C. 510. See also *In the goods of Hatton*, 1 Curt. 595; *Re Lewes's Trust*, L. R. 11 Eq. 236; 6 Ch. 635. See *ante*, p. 227.

(*h*) *Mainwaring v. Baxter*, 5 Ves. 458.

(*i*) *Norris v. Norris*, Finch, R. 419; *Bailey v. Hammond*, 7 Ves. 590; *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. Ch. C. 199.

(*k*) See sect. 42 of the Act, replacing sect. 32 of the Legacy Duty Act (36 Geo. III. c. 52), *ante*, p. 1137.

(*l*) *Stephens v. Venables*, 30 Beav. 625; *Re Pain*, [1919] 1 Ch. 38. As to the effect of notice in questions of priority between equitable assignees, see *Ward v. Duncombe*, [1893] A. C. 369, where all the authorities were considered by the House of Lords. In *Re Dallas*, [1904] 2 Ch. 385, D. charged his expectant interest in a legacy under the Will of his father, then living, first in 1897 in favour of S., and secondly in 1898 in favour of B. The father died in 1902. D. the sole executor renounced probate. In 1903 administration with the Will annexed was granted, and the following day B. gave notice of his charge to the administratrix, and subsequently G., on becoming aware of the grant, also gave notice; it was held that B. was entitled to

Where the legatee is a convict felon, a legacy becoming payable to him during the term of his penal servitude, by virtue of the provisions of sects. 9 and 10 of the stat. 33 & 34 Vict. c. 23, vests in the administrator (if any) appointed by the Crown under that Act, who has absolute power to deal therewith, and subject to the provisions of the Act, all property to which the convict is at the time of his conviction, or becomes while subject to the Act, entitled, is to be preserved and held in trust by the administrator, and on the convict ceasing to be subject to the Act, such property reverts to the convict, his heirs, executors, or administrators (*m*). If no administrator be appointed, an interim curator may be appointed, having the same powers as an administrator (*n*). A legacy acquired by a convict while at large under a ticket of leave is not subject to the Act (*o*).

Where the legatee is a convict felon.

Where a legatee of a share of residue less than 20*l.* has died and has no legal personal representative, the Court will distribute such sum amongst the next of kin of such residuary legatee, without requiring administration to be taken out (*p*).

Where a legacy is under 20*l.*, and the legatee is dead.

SECTION VI.

Interest upon Legacies.

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatee (*q*). Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (*r*): And it is immaterial whether the enjoyment of the principal is postponed by the testator or not (*s*).

Produce of, or interest on, specific legacies:

priority although S.'s delay was not due to any negligence on his part. A trustee is under no obligation to answer the inquiries of a stranger about to deal with the *cestui que trust*: *Low v. Bouverie*, [1891] 3 Ch. 82.

(*m*) Sect. 8.

(*n*) Sects. 21—26.

(*o*) Sect. 30.

(*p*) *Hinings v. Hinings*, 2 H. & M. 32; Ord. XXII. r. 18A. See further, where administration is unnecessary or will be dispensed with in cases of small estates, *ante*, p. 373 *et seq.*

(*q*) *Sleech v. Thorington*, 2 Ves. Sen. 563.

(*r*) *Barrington v. Tristram*, 6 Ves. 345; *Bristow v. Bristow*, 5 Beav. 289; *Clive v. Clive*, Kay, 600. See *ante*, p. 1120, for cases where the question arises between the tenant for life and the remainderman; and *ante*, p. 633, as to apportionment.

(*s*) 2 Rep. Leg. 227, 3rd edit.

Accordingly, it would seem, that the specific legatees of cows, mares, or ewes, are entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy: So also as to the wool of sheep shorn, &c. (*t*).

on general
legacies:

General legacies in their nature carry interest (*u*); and, as in the case of all other claims with that incident, the interest is to be computed from the time at which the principal is actually due and payable.

If a legacy be brought into Court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into Court: But if the money was put out, the legatee shall have the interest which the money put out by the Court yielded (*x*).

In the further consideration of the doctrine of allowing interest on general legacies, the subject may be regarded, First, in cases where the testator has not fixed any time of payment: Secondly, in cases where the time of payment is named by him.

1st. Where
the testator
has fixed no
time for pay-
ment:

1st. Where no time of payment is fixed: The executor is by law allowed one year from the testator's death to ascertain and settle his affairs: at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession: Upon that ground, interest is payable from that time unless some other period is fixed by the Will (*y*). Ord. LV. r. 64, of R. S. C., provides that "where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the Will and in that case according to the Will." Interest will not be payable from an earlier date, although there is a direction in the Will to

(*t*) Wentw. Off. Ex. 445, 14th edit.

(*u*) A legacy of 50*l.* for a ring, is not specific (see *ante*, p. 915), and therefore carries interest with other pecuniary legacies: *Apreece v. Apreece*, 1 V. & B. 364.

(*x*) *Maxwell v. Wettenhall*, 2 P. Wms. 27. But now in most cases money lodged in Court is placed on deposit and bears interest at 2 per cent. See Supreme Court Funds Rules, 1915, r. 76.

(*y*) *Wood v. Penoyre*, 13 Ves. 333, 334; *Walford v. Walford*, [1912] A. C. 658.

pay the legacy "as soon as possible" (z). If, indeed, the legacy is decreed to be a satisfaction of a debt, the Court always allows interest from the death of the testator (a). A further exception to the rule exists in the case of a legacy given to a child by a parent, or one *in loco parentis* (b), whether by way of portion or not: in which instance the Court will give interest *from the death*, to create a provision for its maintenance (c): So where a testator bequeaths a sum of money to an infant, and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death and not be postponed till the end of one year after (d). In *Pickwick v. Gibbes* (e), a testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l.* for his nephew, an infant, and to invest it and apply the income towards his maintenance: The testator had previously given his wife an annuity of 1,000*l.* a year payable quarterly: The wife predeceased the testator: And Lord Langdale, M. R., held that the infant was entitled to interest on his legacy, from the testator's decease. In *Lowndes v. Lowndes* (f), the Court of Exchequer decided that illegitimate children are not within the general exception of a legacy given by a parent to a child. But in *Newman v. Bateson* (g), where a legacy was given to a natural daughter of the testator, with directions that so much of the interest should be applied in her maintenance as his executors should think proper, the Court held, that although the daughter was a natural child yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child; and directed interest from the time of the testator's death (h). This exception, however, is confined to legacies in favour of infants, and has never been extended to a

(z) *Webster v. Hale*, 8 Ves. 410, 413; *Benson v. Maude*, 6 Madd. 15.

(a) *Clarke v. Sewell*, 3 Atk. 99. So where the testator charged his real estate by Will with the simple contract debts of another person, he was considered as having adopted those debts as his own, and the creditors, as legatees, were held entitled to interest from his death: *Shirt v. Westby*, 16 Ves. 393.

(b) *Wilson v. Maddison*, 2 Y. & C. Ch. C. 372. As to what persons stand *in loco parentis*, see *ante*, p. 1075.

(c) *Beckford v. Tobin*, 1 Ves. Sen. 310; *Crickett v. Dolby*, 3 Ves. 13.

(d) *Re Richards*, L. R. 8 Eq. 119.

(e) 1 Beav. 271; but see *Re Palfreman*, [1914] 1 Ch. 877, *post*, p. 1158.

(f) 15 Ves. 301.

(g) 3 Swanst. 689.

(h) See also *Dowling v. Tyrell*, 2 Russ. & M. 343; Acc.

legacy given to an adult (*i*). Nor does it apply to the case of a wife (*k*). Nor does it apply to a legacy to a son payable on attaining twenty-five (*l*).

After the expiration of the year from the death of the testator, the legacy will carry interest, although payment be, from the condition of the estate, impracticable (*m*), and although the assets have been unproductive (*n*): The general rule was stated by Lord Redesdale, in *Pearson v. Pearson* (*o*): "Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening v. Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death; and the Court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months, all the intermediate profits belong to the residuary legatee: The executor may pay the legacy within the twelve months, but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest: But if he has

(*i*) *Raven v. Waite*, 1 Swanst. 553; *Wall v. Wall*, 15 Sim. 513; cf. *Re Ramsay*, *post*, p. 1160.

(*k*) *Stent v. Robinson*, 12 Ves. 461; *Re Whittaker*, 21 C. D. 657. A legacy to the testator's wife, in lieu of dower and freebench, carries interest only from the expiration of a year from the testator's death: *Re Bignold*, 45 C. D. 496.

(*l*) *Re Abrahams*, [1911] 1 Ch. 108.

(*m*) *Wood v. Penoyre*, 13 Ves. 334. A testator gave a legacy to his daughter, and all his real and personal estate to his wife, and after her death, he gave his real estate, subject to the legacy to his son in fee: The wife survived the testator, and afterwards died: And Sir L. Shadwell, V.-C., held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient: *Freeman v. Simpson*, 6 Sim. 75. See also *Milltown v. Trench*, 4 Cl. & Fin. 276; *S. C.*, 10 Bligh, N. S. 1.

(*n*) So it has been held that if a legacy be given to A., subject to the payment of a minor sum to B., interest on such minor sum is payable by A. to B. from the end of a year after the testator's death, notwithstanding that, in consequence of litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of his own legacy, which did not, in the meanwhile, make interest: *Hertford v. Lowther*, 9 Beav. 266. See also *Fisher v. Brierley*, 30 Beav. 268; *Re Blackford*, 27 C. D. 676, where the property consisted mainly of a reversionary interest.

(*o*) 1 Sch. & Lef. 10.

assets, he is to pay interest from the end of the twelve months, whether the assets have been productive or not."

So a demonstrative legacy directed to be paid out of a reversionary fund is no exception to the rule that where no time is fixed for payment a legacy is payable at and bears interest from the end of a year after the testator's death (*p*).

Where a legacy was given to A., to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator, it was held that B. was entitled to interest on the legacy from the death of A.; for although it was objected that, this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator (*q*).

An annuity bestowed by Will, without mentioning any time of payment, is considered as commencing from the death of the testator, and the first payment as due at the expiration of one year (*r*): from which latter period interest may be claimed in cases where it is allowed at all. But, generally speaking, the Court of Chancery has refused application for interest upon the arrears of annuities given by Will (*s*): unless in cases where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment, against which he is obliged to seek relief in equity: there no assistance will be given him by the Court, except upon terms of doing equity, viz.: by consenting to pay the grantee of the annuity the arrears due, with interest (*t*).

Interest on annuities:

The question, whether a legatee for life is entitled to interest from the death of the testator, or from the end of the year after his death, has been considered in a previous section (*u*).

Interest on bequests for life:

Where a legacy is charged on real property, and no day of

(*p*) *Walford v. Walford*, [1912] A. C. 658.

(*q*) *Laundy v. Williams*, 2 P. Wms. 481. As to a vested legacy to an infant, subject to be divested, see *post*, p. 1161.

(*r*) See *ante*, p. 1115.

(*s*) *Torre v. Browne*, 5 H. L. C. 555; *Booth v. Coulton*, 2 Giff. 514.

(*t*) *Ferrers v. Ferrers*, Cas. temp. Talb. 2; 2 Rop. Leg. 309, 3rd edit. Other cases where the Court has allowed interest on arrears have been where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the payment of interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay: *Torre v. Browne*, 5 H. L. C. 578.

(*u*) *Ante*, p. 1116 *et seq.*

payment is mentioned in the Will, interest will be given from the testator's death (*x*); but where a legacy is payable out of the proceeds of sale of real estate, it was held by Jessel, M. R., that interest was payable from a year after the testator's death (*y*).

2ndly. When the time of payment is fixed:

2. With respect to interest on general legacies, where the time of payment is fixed by the testator: The general rule is, that the legacies will not carry interest before the arrival of the appointed period: as, for instance, when the legatee shall attain twenty-one (*z*): Nor will it make any difference that the legacy is vested (*a*).

Where, however, a fund is severed immediately from a testator's death for the benefit of the objects of the gift (*b*), not

(*x*) *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Spinway v. Glynn*, 9 Ves. 483.

(*y*) *Turner v. Buck*, L. R. 18 Eq. 301. Cf. *Re Waters*, 42 C. D. 517, where the trust for sale was after the death of the tenant for life, and it was held that the legacy carried interest from the death.

(*z*) *Heath v. Perry*, 3 Atk. 101; *Tyrrell v. Tyrrell*, 4 Ves. 1. Interest is payable only from the time the legacy is receivable: *Earle v. Bellingham*, 24 Beav. 448; but see *Walford v. Walford*, [1912] A. C. 658. There seems to be no rule that if the appointed period (*e.g.*, the legatee's attaining twenty-one or marrying with consent) arrived in the lifetime of the testator, the legacy will carry interest from his death: *Re Palfreeman*, [1914] 1 Ch. 877, where *Coventry v. Higgins*, 14 Sim. 30, was questioned. As to a legacy payable on the death of a tenant for life, see *Re White*, 101 L. T. 780.

(*a*) *Heath v. Perry*, 3 Atk. 102, by Lord Hardwicke; *Crickett v. Dolby*, 3 Ves. 10; *Festing v. Allen*, 5 Hare, 575, 577. Where a testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience, Alderson, B., held that the legatees were not entitled to interest on their legacies before the expiration of the three years: *Thomas v. Att.-Gen.*, 2 Y. & C. 525. See also *Lord v. Lord*, L. R. 2 Ch. 782. But where there was a direction to invest the legacies within seven years of the testator's death, and such direction was for the convenience of the estate, and not for the benefit of the residuary legatee, it was held that as the estate was sufficient to pay them at the testator's death, interest must be paid from the end of a year after: *Varley v. Winn*, 2 K. & J. 700. In *Olive v. Westerman*, 53 L. J. Ch. 525, there was a direction to pay legacies within four years; the legacies remained unpaid by reason of the inability of the legatees, being infants, to give receipts, and not for the convenient administration of the estate: It was held that the unpaid legacies carried interest from the expiration of a year from the death of the testator.

(*b*) That is to say, severed by direction of the testator: thus Cotton, L. J., in *Re Dickson*, 29 C. D. 331, 336, says, speaking of what sums can properly be said to be held by trustees in trust for an infant, "As to each of these sums I should say it did not come within that description, because it was not set apart by the direction of the testator so as to be held by these trustees for the benefit of the infant, but was only retained by the trustees to enable them to comply with the directions

only is the gift vested (*c*), but carries the interim income, though the only gift is in a direction to pay at a future time (*d*). A legacy payable on the death of a tenant for life carries interest from the death of the tenant for life (*e*).

Again, as we have seen (*f*), this rule is subject to an exception in case of the testator being the parent (or *in loco parentis*) (*g*) of the legatee: For there, whether the legacy be vested or contingent, if the legatee be not an adult (*h*), interest on the legacy shall be allowed, as a maintenance, from the time of the death of the testator (*i*), *if there is no other provision for that purpose* (*k*). The Court will determine the *quantum* of allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances (*l*).

legacies to
children of
testator :

Where the legatee is the child of the testator, and a specific sum is given by the Will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy (*m*). But the Court has in some cases increased the allowance, where it was insufficient for a reasonable maintenance, and where the legacy was

in the Will if and when the infant attained twenty-one." See also *Re Inman*, [1893] 3 Ch. 518; *Re Judkins' Trusts*, 25 O. D. 743; *Re Medlock*, 55 L. J. Ch. 738; *Festing v. Allen*, 5 Ha. 573; *Re Clements*, [1894] 1 Ch. 665; *Re Woodin*, [1895] 2 Ch. 309; *Re Eyre*, [1917] 1 Ch. 351.

(*c*) See *ante*, p. 987.

(*d*) *Dundas v. Wolfe Murray*, 1 Hemm. & M. 425; *Re Inman*, *ubi sup.*; *Re Snaith*, 71 L. T. 318; *Re Eyre*, *supra*.

(*e*) *Re White*, 101 L. T. 780. 25 E. & E. 413

(*f*) *Ante*, p. 1155.

(*g*) *Acherley v. Vernon*, 1 P. Wms. 783; *Hill v. Hill*, 3 V. & B. 183; *Mills v. Robarts*, 1 Russ. & M. 555; *Leslie v. Leslie*, Cas. Temp. Sugd. 4; *Rogers v. Soutten*, 2 Keen, 598; *Wilson v. Maddison*, 2 Y. & C. Ch. C. 372; *Russell v. Dickson*, 2 Dr. & War. 133.

(*h*) *Raven v. Waite*, 1 Swanst. 553; *Wall v. Wall*, 15 Sim. 513; *Re Abrahams*, [1911] 1 Ch. 108.

(*i*) *Harvey v. Harvey*, 2 P. Wms. 21; *Incedon v. Northcote*, 3 Atk. 438; *Chambers v. Goldwin*, 11 Ves. 2; *Brown v. Temperley*, 3 Russ. Chanc. Cas. 262; *Martin v. Martin*, L. R. 1 Eq. 369. Even though the Will should contain an express direction that the interest shall accumulate: *Mole v. Mole*, 1 Dick. 310; *M'Dermott v. Kealey*, 3 Russ. Ch. Cas. 264, note. In the case of a child *en ventre sa mère*, interest must be computed from the time of its birth: *Rawlins v. Rawlins*, 2 Cox, 425.

(*k*) *Wynch v. Wynch*, 1 Cox, 433; *Donovan v. Needham*, 9 Beav. 164; *Rudge v. Winnall*, 12 Beav. 357; *Re Rouse's Estate*, 9 Hare. 649; *Re West*, [1913] 2 Ch. 345.

(*l*) 2 Rep. Leg. 234, 3rd edit.

(*m*) *Hearle v. Greenbank*, 3 Atk. 716; *Long v. Long*, 3 Ves. 286, note; *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Re George*, 5 C. D. 837. See p. 1144.

vested (*n*), or, where maintenance has been given up to a particular date or the happening of a particular event during infancy, has allowed interest on a legacy for maintenance in the interval between that date and majority (*o*).

Where an infant is entitled to maintenance out of one or other of two contingent legacies, the Court will select that which will be most for the benefit of the infant, and declare that interest at 4 per cent. is payable upon it, to be applied for his maintenance (*p*).

This exception is not extended in favour of nephews and nieces (*q*), nor of grandchildren (*r*) unless the testator were *in loco parentis*, nor where the parent is the mother unless *in loco parentis* (*s*).

apparent intention that the legatees shall be maintained out of the bequest:

Again, in some instances, legacies payable at a future period will carry interest, although not given by a parent, or a person *in loco parentis*, where there appears an intention on the part of the testator that the legatees shall be maintained out of the property bequeathed to them (*t*). But this does not apply to a case where the testator, in addition to the future legacy, makes provision for the maintenance of the legatee out of other funds (*u*).

Where a testator bequeaths a legacy to an adult subject to the obligation of maintaining children towards whom he stands *in loco parentis*, it will carry interest from the testator's death if the primary object is to provide maintenance (*x*). *Secus*, if the legatee is the primary object of the testator's bounty (*y*).

Where the payment of a legacy is postponed by the testator to a future period, as until the legatee attains twenty-one, and the Will directs, that when that period arrives, the payment

(*n*) *Aynsworth v. Pratchett*, 13 Ves. 321; 2 Rop. Leg. 238, 3rd edit. See *Turner v. Turner*, 4 Sim. 430.

(*o*) *Chambers v. Goldwin*, 11 Ves. 2; *Martin v. Martin*, L. R. 1 Eq. 369.

(*p*) *Martin v. Martin*, L. R. 1 Eq. 369; and see *ante*, p. 1148.

(*q*) *Crickett v. Dolby*, 3 Ves. 10.

(*r*) *Haughton v. Harrison*, 2 Atk. 330; *Butler v. Freeman*, 3 Atk. 58; *Descrambes v. Tomkins*, 4 Bro. C. C. 149, note; *S. C.*, 1 Cox, 133; *Festing v. Allen*, 5 Hare, 579.

(*s*) *Re Eyre*, [1917] 1 Ch. 351.

(*t*) *Leslie v. Leslie*, Cas. temp. Sugd. 1; *Re Churchill*, [1909] 2 Ch. 341.

(*u*) *Re West*, [1913] 2 Ch. 345.

(*x*) *Re Ramsay*, [1917] 2 Ch. 64.

(*y*) *Re Crane*, [1908] 1 Ch. 379.

legacy given "with interest."

shall be made *with interest*, the legacy will bear interest only from the end of the year after the testator's death (z).

Where a vested legacy, either particular or residuary, is given to an infant, without appointing any time for payment, and it is subject to a limitation over upon a divesting contingency, which takes effect; as where the legacy is given upon condition to divest it upon the death of the legatee under twenty-one, and he dies under that age: yet as the legacy was payable at the end of the year after the testator's death, the executor or administrator of the infant legatee, and not the legatee over, will be entitled to the interest which accrued on the legacy during the infant legatee's life (a).

Interest of legacy during lifetime of infant legatee whose death under age divests the legacy.

The same doctrine prevails with respect to a gift of a *residue*, where the bequest is such as to *vest* immediately, but not *payable* until the legatee shall attain twenty-one, with a bequest over, divesting the legacy in case he dies under that age: In that case also, although the legatee dies under twenty-one, his personal representative will be entitled to the interest which became due during the legatee's life (b).

The rule is otherwise with respect to contingent bequests (c), even in those cases where the infant is entitled to maintenance out of the income of a contingent legacy, by reason of the testator being the father of or standing *in loco parentis* towards the infant. So where a *particular* legacy, though vested, is not payable till twenty-one, and nothing is said in the Will that shows the testator's intention to give interest in the meantime, in such case, if the legacy be divested by the death of the legatee before attaining twenty-one, his personal representatives cannot claim the interest accruing till his death (d).

(z) *Knight v. Knight*, 2 Sim. & Stu. 792.

(a) *Taylor v. Johnson*, 2 P. Wms. 504; *Shepherd v. Ingram*, Ambl. 448; *Branstrom v. Wilkinson*, 7 Ves. 420; *Mills v. Robarts*, 1 Russ. & M. 555; *M'Donald v. Bryce*, 2 Keen, 284; *Barber v. Barber*, 3 Mylne & Cr. 688. See also *Webb v. Kelly*, 9 Sim. 469; *Re Buckley's Trusts*, 22 C. D. 583.

(b) *Nicholls v. Osborn*, 2 P. Wms. 419; *Chaworth v. Hooper*, 1 Bro. C. C. 81; *Hawkins v. Combe*, 1 Bro. C. C. 335; *Re Smith*, 42 C. D. 302. And see *Skey v. Barnes*, 3 Meriv. 345, 346, *per* Sir W. Grant.

(c) See Cox's note to *Taylor v. Johnson*, 2 P. Wms. 506. See also *Descrambes v. Tomkins*, 1 Cox, 133; *S. C.*, 4 Bro. C. C. 149, *in notis*; *Glanvill v. Glanvill*, 2 Meriv. 38; *Thruston v. Anstey*, 27 Beav. 337, *per* Wood, V.-C.; *Re Inman*, [1893] 3 Ch. 518; *Re Bowlby*, [1904] 2 Ch. 685.

(d) See Mr. Sanders's note to *Heath v. Perry*, 3 Atk. 102, and that of Mr. Cox to *Taylor v. Johnson*, 2 P. Wms. 506; *Re Bowlby*, *supra*.

But where a particular legacy is given, even contingent upon the event of the legatee attaining twenty-one, with *interest in the meantime*, and the legatee dies before that age, the arrears of interest up to the time of his death will, it seems, belong to his personal representatives (e).

Legacy to an infant as executor.

A legacy given to an infant as executor is payable only on his accepting the office and duties of executor; such a legacy will not therefore carry interest from the testator's death, since the legatee cannot accept the office until he attains twenty-one (f).

Rate of interest.

It remains to consider the rate of interest allowed on legacies: The rule at present established is to allow 4 per cent., whether the legacy be charged upon land, or payable out of personal estate only, unless the Will directs otherwise (g). Nor will the rule be varied, it should seem, in the Courts here, by reference to the higher rate of interest allowed in the country where the testator was domiciled, or where the fund was invested at the time of making the Will. The English Court having the administration of the property comprised in the English Will must administer the estate according to the rules of English law. Therefore, although the testator is domiciled in France, the interest payable on legacies given by his Will is governed by the law of the country in which the estate is being administered (h). So also a legacy by a testator domiciled in Antigua will not, in an English Court, be allowed to bear Antigua interest (i): So if a legacy is given in the currency of Jamaica, where the testator resided, and there are assets and executors in both countries, the legatee shall be allowed interest at 4 per cent. only, and not Jamaica interest, in a suit in an English Court against the English executor (k). The principle is, that the fund is supposed in the course of a year after the testator's death to come into the hands of the executor, and that

(e) *Harris v. Finch*, M'Clel. 141: but see *Errington v. Chapman*, 12 Ves. 20.

(f) *Re Gardner*, 67 L. T. 552.

(g) R. S. C. 1883, Ord. LV. r. 64. *Re Campbell*, [1893] 3 Ch. at 472; *Re Davy*, [1908] 1 Ch. 61.

(h) *Hamilton v. Dallas*, 38 L. T. 215. But cf. *Re Fitzgerald*, [1903] 1 Ch. 933; [1904] 1 Ch. 573 (C. A.).

(i) *Malcolm v. Martin*, 3 Bro. C. C. 50. See also *Stapleton v. Conway*, 1 Ves. Sen. 427. The case of *Raymond v. Brodbelt*, 5 Ves. 199, was decided on its particular circumstances: By Sir W. Grant, in *Bourke v. Ricketts*, 10 Ves. 334.

(k) *Bourke v. Ricketts*, 10 Ves. 330.

the executor can make 4 per cent. of it here. If it were proved that the fund was abroad, and greater interest made, it might be otherwise (*l*).

But interest has been directed to be computed, as against the executor, at 5 per cent., when the property has been employed by him in trade (*m*). Generally, an executor improperly retaining balances is charged with interest at 4 per cent., but if, in addition, he commits a breach of trust or changes money from a proper to an improper state of investment, he is charged 5 per cent. If he employ the trust money in trade, he will be charged either with the profits or 5 per cent. compound interest (*n*). So in a case where an executor was directed to lay out the testator's personalty in the funds, and he unnecessarily sold out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, he was charged with 5 per cent. interest and costs (*o*). And in a case where trustees and executors after payment of a testator's debts kept the balance of the personal estate at their bankers, the Court charged them with interest on the balance at 5 per cent. from the date of the payment of the debts (*p*).

The interest on legacies is to be computed upon the principal only, and not upon the principal and interest (*q*). But under particular circumstances, the Court will allow the legatee compound interest: As where there is an express direction in the Will that the executor should lay out the fund to accumulate, and he neglects to do so (*r*).

Simple interest except under particular circumstances.

(*l*) *Malcolm v. Martin*, 3 Bro. C. C. 54, by Lord Alvanley.

(*m*) *Heathcote v. Hulme*, 1 Jac. & Walk. 122; *Williams v. Powell*, 15 Beav. 461; *Re Davis*, *infra*. See also *Burnell v. Brown*, 1 Jac. & Walk. 175, as to the interest where the property is wrongfully withheld.

(*n*) *Jones v. Foxall*, 15 Beav. 388; *Re Davis*, [1902] 2 Ch. 314.

(*o*) *Crackelt v. Bethune*, 1 Jac. & Walk. 586. See also *Mosley v. Ward*, 11 Ves. 581; *Knott v. Cottee*, 16 Beav. 77; *post* Pt. iv. Bk. II. Ch. II. § II. In *Re Barclay*, [1893] 1 Ch. 674, where the executor simply retained moneys which he ought to have invested, he was charged with interest at the rate of 3 per cent., but that is not in accordance with the present changed conditions. See *Re Beech*, [1920] 1 Ch. 40.

(*p*) *Re Jones*, 49 L. T. 91.

(*q*) *Perkyns v. Baynton*, 1 Bro. C. C. 574; *Crackelt v. Bethune*, 1 Jac. & Walk. 586.

(*r*) *Raphael v. Boehm*, 11 Ves. 92; *S. C.*, 13 Ves. 599; *Dornford v. Dornford*, 12 Ves. 127; *Jones v. Foxall*, 15 Beav. 388, 431; *Knott v. Cottee*, 16 Beav. 77. See *post*, Pt. iv. Bk. II. Ch. II. § IV.

In a case where the testator gave to each of certain infant nephews and nieces by name, a sum of money "with compound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen;" it was held by Sir C. Pepys, M. R., that compound interest at 5 per cent. was to run on each of the legacies from the birthdays of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death (s).

SECTION VII.

By Whom Duty is Payable.

Duties payable by executor or administrator unless otherwise provided for.

It will be observed, by referring to the statute 36 Geo. III. c. 52, s. 6, that the duties, in all cases wherein it is not otherwise thereby provided for, must be paid by the executor or administrator, upon retainer for his own benefit, or for the benefit of any other persons, of any legacy or part of any legacy, or of the residue or any part of such residue, which he shall be entitled so to retain; and also upon delivery, payment, or discharge of any legacy or residue, &c., to which any other person shall be entitled (t). It is the duty of the executors to deduct the Legacy duty when they pay the legacy, and if they do not do so, they are made personally responsible (u).

Legacy duty to be deducted by executor or administrator.

(s) *Arnold v. Arnold*, 2 M. & K. 365.

(t) By the Finance Act, 1910, s. 58 (1), any legacy or succession duty formerly payable at the rate of 3 per cent. is now payable at the rate of 5 per cent., and those formerly payable at the rate of 5 or 6 per cent. at the rate of 10 per cent. There are therefore now only three rates of legacy and succession duty, viz.: 1 per cent. payable by lineals, 5 per cent. payable by near relatives, and 10 per cent. by all other persons. The 1 per cent. duty, which by sect. 1 of the Act of 1894 was not payable where estate duty was payable, has been restored in certain cases by sect. 58 (2) of the Act of 1910, and is made payable as between husband and wife. This 1 per cent. duty is not, however, payable where the principal value of the property passing on the death does not exceed 15,000*l.*, or where the amount of the legacies or successions derived from the same death does not exceed 1,000*l.*, or, in the case of a widow or child under twenty-one, 2,000*l.* This section applies only to persons dying on or after April 30, 1909, and "legacy" includes residue and share of residue. By sect. 16 (3) of the Act of 1894, legacy and succession duties are not payable in the case of estates not exceeding 1,000*l.* net, and sect. 13 (2) of the Act of 1914 provides for the reduction of such duties where the margin above the limit of value is small.

(u) *Per Parke, B.*, in *Re Sammon*, 3 Mees. & W. 383. There is a plain distinction between Legacy duty and Succession duty in this

By the statute 45 Geo. III. c. 28, s. 5, it is provided, that the duties imposed on legacies charged upon, or made payable out of real estate, &c., shall be paid by the trustee or other person entitled to the real estate which is subject to the legacy, and that the duty shall be retained by the person paying such legacy, in like manner as is provided, respecting legacies out of personal estate, by the statute 36 Geo. III. c. 52. In the case of *Att-Gen. v. Jackson* (x), the land out of which the legacy was payable had been devised to two persons in moieties; the one moiety to the one for life, and the other moiety to the other in fee: And the Court of Exchequer held, that both the parties, the tenant for life of the one moiety, and the tenant in fee of the other, were liable to the Crown for the payment of the Legacy duty.

The collection of the Succession duty is provided for by the 44th and five following sections of the statute 16 & 17 Vict. c. 51, by which that duty is imposed. And it will be observed, that by the interpretation clause (y), the term "trustee" is to include an executor or administrator.

It was decided in *Hales v. Freeman* (z), upon the construction of the Legacy Duty Acts, that a trustee under a Will, who had paid the Legacy duty upon an annuity, charged on land, after the expiration of four years from the death of the testator, might recover the amount of duty so paid from the legatee, notwithstanding a previous assignment of the annuity by such legatee (a).

But a question may arise, whether the legacies are not, by the terms of the Will, to be paid in full, free of the Legacy duty, so as to make it incumbent on the executor to retain the duty out of the residue, instead of deducting it from the payment to the legatee (b).

respect—the Legacy Duty Act provides that the executors shall be liable to see to the payment of the duty; the Succession Duty Act does not contain a similar provision applicable to sums which an executor has to pay under a covenant: *per* Lindley, L. J., in *Re Higgins*, 31 C. D. 142, 146. As to limitation of an executor's liability by lapse of time, *see post*, p. 1173.

(x) 2 Cr. & Jerv. 101.

(y) Sect. 1.

(z) 1 Brod. & Bing. 391; S. C., 4 Moo. 21.

(a) This case was recognized and acted on in *Stow v. Davenport*, 5 B. & Adol. 366; *Bate v. Payne*, 3 Q. B. 900. A purchaser from a legatee is not necessarily subject to the same liability as the legatee himself in this respect: *Farwell v. Seale*, 3 De G. & Sm. 359.

(b) In such cases, no duty shall be chargeable on the money to be

In *Barksdale v. Gilliat* (c), the testator directed all the legacies to be paid at the expiration of six months after his decease *without any deduction*: And Lord Eldon held, that the legatees were entitled to the full amount, and that the Legacy duty must be paid by the executors. So in *Smith v. Anderson* (d), the testator gave certain annuities, and directed them to be paid *without any deduction whatsoever*: And Sir John Leach, M. R., held, that the annuities should be paid clear of Legacy duty, on the ground that, from the nature of the property out of which the annuities were to be paid, there could be no deduction, except in respect of the Legacy duty: His Honour, in giving judgment, said, that he admitted that it was to be stated as the fair result of Lord Eldon's judgment in the above case of *Barksdale v. Gilliat*, that his Lordship considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the Legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The correctness, however, of this view of Lord Eldon's judgment was denied by Lord Brougham in *Louch v. Peters* (e), and by Alderson, B., in *Gude v. Mumford* (f).

In *Dawkins v. Tatham* (g), an annuity was given by a Will

applied to the payment of the duty: see stat. 36 Geo. III. c. 52, s. 21. A direction in a Will, "I direct all the legacies left by my Will and codicil to be paid free of Legacy duty," will not free property liable to Succession duty from that duty: *Re Johnston*, 26 C. D. 538, 554, in which case it was held that the Legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. See also *Ansley v. Cotton*, 16 L. J. Ch. 55, where it was held that the general term "legacy" will include a gift of stock, and *Douglas v. Congreve*, 1 Keen, 410, where it was held that the term "pecuniary legacy" will not have that effect, although it will include the forgiveness of a debt: *Morris v. Livie*, 11 L. J. Ch. 172. Where legacies are directed to be paid free of duty, and the estate is insufficient to pay all the legacies and duties in full, the duty on each legacy is to be treated as an additional legacy and added to the original legacy, and then both legacies must abate rateably: *Re Turnbull*, [1905] 1 Ch. 726; *Re Snape*, [1915] 2 Ch. 179.

(c) 1 Swanst. 562.

(d) 4 Russ. Chanc. Cas. 352.

(e) 1 M. & K. 489.

(f) 2 Y. & C. 448.

(g) 2 Sim. 492. It must be observed, that in the case already mentioned of *Hales v. Freeman*, 1 Brod. & Bingh. 391, the Court of C. P. held that a legatee, to whom an annuity was given "clear of all deduction," was compellable to refund the amount of the duty: But the point which might have been raised upon the construction of these words does not appear to have been noticed by either the bar or the

clear of all deductions, and was directed to be paid out of certain sums of stock standing in the testator's name: and Sir L. Shadwell, V.-C., held that the executors were bound to pay the legacy, free from the legacy tax.

In *Stow v. Davenport* (*h*), lands were devised to the use among others, that M. A. F. should take, from and out of the same premises, an annuity or yearly charge of 500*l.* a year, to be paid *clear of all taxes and deductions*, remainder to S. for life, subject to the annuity: And the Court of King's Bench held, that the annuity was to be paid clear of Legacy duty, and was a charge upon the land; and consequently, that S., who had entered into possession under the devise to him, and been compelled to pay the Legacy duty on the annuity, pursuant to 45 Geo. III. c. 28, s. 5, could not recover it again from the annuitant (*i*).

Again, in *Louch v. Peters* (*k*), a testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half-yearly, out of real estate, *clear of all taxes and outgoings*: And it was held, by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the annuitant took it clear of the Legacy duty.

Further, in *Courtoy v. Vincent* (*l*), a testator directed his executors and trustees to pay certain annuities and legacies *clear of the property tax*, and *all expenses attending the same*: And it was held by Sir T. Plumer, M. R., that the Legacy duty ought to be paid out of the assets of the testator, and that the

bench; and the argument and decision proceeded on a totally distinct ground.

(*h*) 5 B. & Adol. 359; *S. C.*, Nev. & M. 805.

(*i*) Whether or not an annuity is to be free from any deduction for income tax must depend upon the meaning of the words used by the testator, that is, upon the meaning with which he uses the word "deduction." *Primâ facie* the word "deduction" does not include income tax, because income tax is not a deduction, but a payment—to be made by the recipient of the legacy; and there must be something else besides the word "deduction" to make the gift of an annuity free of income tax. In the cases of *Festing v. Taylor*, 3 B. & S. 217; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & Sm. 62; *Re Bannerman's Estate*, 21 C. D. 105, the Court found sufficient to construe the Will in the wider sense. In the cases of *Wall v. Wall*, 15 Sim. 513; *Abadam v. Abadam*, 33 Beav. 475; *Sadler v. Rickards*, 4 K. & J. 302; *Peareth v. Marriott*, 22 C. D. 182; *Gleadow v. Leetham*, 22 C. D. 269; *Re Buckle*, [1894] 1 Ch. 286; *Re Musgrave*, [1916] 2 Ch. 417; *Re Saillard*, [1917] 2 Ch. 140; *Re Loveless*, [1918] 2 Ch. 1; *Re Wooldridge*, [1920] W. N. 78, the Court was unable to admit such construction; and see *ante*, p. 1116, n. (*h*).

(*k*) 1 M. & K. 489.

(*l*) 1 Turn. & Russ. 433; *Re Briscoe*, *inf.*

annuitants and legatees were entitled to receive the full amount of their respective legacies and annuities, without any deductions in respect of Legacy duty.

So in *Godsden v. Dotterill* (*m*), a testator bequeathed to his sister a legacy of 100*l.*, to be paid to her *free from all expense*; and it was held by Sir J. Leach, M. R., that this legacy was to be paid discharged of duty.

Again, in *Gude v. Mumford* (*n*), a testator devised to James Metherell, for his life, "one annuity or *clear* yearly sum of 100*l.*," and charged his estates at Chobham with the payment of "the said annuity or yearly sum of 100*l.*:" He then devised the estates at Chobham to trustees, in trust to levy and raise the annuity, and pay the same to James Metherell; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee: And Alderson, B., held that James Metherell was entitled to the annuity clear of all deductions for Legacy duty, and that the residuary estate was chargeable with the duty payable thereon: The learned Baron observed, that it was clear, from the authorities on the subject, that if, from any directions contained in the Will, an intention on the part of the testator can be collected that the Legacy duty should be paid by the executor, the Court will carry that direction into effect: And the learned Judge denied that the view taken by Sir J. Leach (*o*), of Lord Eldon's judgment in *Barksdale v. Gilliat*, was correct; but declared his opinion, that the right construction of it was, that Lord Eldon considered the words "without deduction" to mean, in their ordinary sense, "clear of all deduction," and then went on to examine, whether, in the four corners of the Will, he could find the same words used, in another sense, or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and upon the whole he arrived at the conclusion that the words must be used in their ordinary sense without qualification (*p*).

(*m*) 1 M. & K. 56; *Re Briscoe*, [1910] W. N. 251.

(*n*) 2 Y. & Coll. 448.

(*o*) See *ante*, p. 1166.

(*p*) See also accord. *Marris v. Burton*, 11 Sim. 161; *Ford v. Ruxton*, 1 Coll. 403; *Bailey v. Boulton*, 14 Beav. 595; *Haynes v. Haynes*, 3 De G. M. & G. 590; 19 Beav. 499; *Warbrick v. Varley*, 30 Beav. 241; *Re Coles's Will*, L. R. 8 Eq. 271; *Re Coxwell*, [1910] 1 Ch. 63; *Re Grant*, 85 L. J. Ch. 31.

But in *Foster v. Ley* (*q*), where a testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her will that the same should be discharged," and the moneys remaining unexpended, to her nephew; the Court of Common Pleas held, that the creditors ought to pay the Legacy duty upon their several debts; and that the matter having been overlooked in an order made by the Court of Chancery for the payment of the debts, the executors, who had paid the debts in full, and then paid the Legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.

Again, in *Sanders v. Kiddell* (*r*), a testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the *clear* yearly sum of 500*l.*, upon trust to pay the annual produce to certain of her relations in succession for life, and afterwards, as to one-fifth part, upon trust to pay it to M. C. Gascoigne for his life, and after his decease, to any wife who might survive him, during her life, and after the decease of the survivor of them, upon trust for his children: And Sir L. Shadwell, V.-C., held that the fund was not exempted from Legacy duty; for that it appeared, from the language of the Will, that the testatrix meant that what she had directed to be done, should be done at once; that M. C. Gascoigne might or might not marry a relation of the testatrix, and his children might be related in some degree to the testatrix, or they might not; and, therefore, that the word "clear" must be taken to refer not to the Legacy duty, but to the expenses of investment, and so on (*s*). And this case was recognised and acted upon by Romilly, M. R., in *Pridie v. Field* (*t*).

(*q*) 2 Bingh. N. S. 269.

(*r*) 7 Sim. 536.

(*s*) In this case the testator did not use the words "clear of all deductions," and besides, the parties were to take in succession: *per* Shadwell, V.-C., in *Marris v. Burton*, 11 Sim. 161, 163. Where a legacy, the fund being in Court, was assigned by a deed, which represented that it was *unincumbered*, it was held that the Legacy duty did not constitute an "incumbrance:" *Bliss v. Putnam*, 7 Beav. 40. In all cases of assignment of reversionary interests the Legacy duty which becomes payable on their falling into possession falls, in the absence of express contract, on the assignee; and where the owner of a reversionary interest settles a part of it, there is no rule which throws the burden of the Legacy duty upon the part retained, and a covenant for further assurance does not bind the settlor to indemnify the settled fund against Legacy duty: *Re Repington*, [1904] 1 Ch. 811.

(*t*) 19 Beav. 497.

Where one legacy is given by Will free of duty, and by a codicil another is given in *substitution* of that given by the Will, and upon the same trusts, the substituted legacy is also to be considered as given free from the duty; because, being a mere substitution, it is *primâ facie* attended with the same incidents: so where a subsequent addition is made to a prior legacy, the addition will have the same qualities (*u*).

Thus in *Cooper v. Day* (*x*), the testator gave to his widow 800*l.*, payable within three months from his death, and free from Legacy duty: He also gave 4,000*l.* to trustees, payable to them within the same period, free from Legacy duty, in trust for his two daughters, to be paid at twenty-one, with intermediate interest for their maintenance: By a codicil, the testator bequeathed to his wife an additional sum of 200*l.* free from Legacy duty: he also revoked the legacy of 4,000*l.* and in substitution gave in trust for his daughters 5,000*l.*, "upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisoes and limitations, as expressed in his Will concerning the legacy of 4,000*l.*": By a second codicil the testator revoked the gift of 5,000*l.*, and gave in its place 6,000*l.* to the same trustees, upon the trusts, &c., following the words in the first codicil: The only question was, whether the legacy of 6,000*l.* was to be paid free of the Legacy duty: and Sir William Grant declared, upon the authority of the cases of *Leacroft v. Maynard* (*y*), and *Crowder v. Clowes* (*z*), that the substituted legacy of 6,000*l.* was to be taken as exempted from the Legacy duty, in like manner with the original legacy, in the place of which it was given. So in *Shaftesbury v. Marlborough* (*a*), a testator by his Will gave an annuity to his grandson, and directed the executors to pay the Legacy duty on all the legacies and annuities given by his Will: By a codicil, he gave an annuity to his grandson *in lieu* of the annuity given by his Will: And Sir L. Shadwell, V.-C., held, that the annuity given by the codicil was free from Legacy duty; his Honour observing, that when the thing bequeathed by a codicil is given as a mere substitution for that which is

(*u*) By Sir J. Leach, V.-C., 6 Madd. 31. See the cases collected, *ante*, p. 1040; *infra*, note (*b*).

(*x*) 3 Meriv. 154.

(*y*) 3 Bro. C. C. 233; *S. C.*, 1 Ves. 279. See *Re Backhouse*, [1916] 1 Ch. 65.

(*z*) 2 Ves. 449, 450.

(*a*) 7 Sim. 237.

bequeathed by the Will, it is to be taken with all its accidents (*b*).

But in *Chatteris v. Young* (*c*), the testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and after her death, the principal was to be paid to such person or persons, as she might by her Will appoint; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that 'all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of Legacy duty: The daughter having died in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by my Will, which are now lapsed," bequeathed to her husband 20,000*l.*: Sir John Leach, V.-C., decreed (*d*), that the husband was not entitled to have the 20,000*l.* paid to him free of Legacy duty: And upon appeal to the Lord Chancellor, his Lordship (Lord Lyndhurst) was of opinion that the legacy given to the husband by the codicil could not be considered as given by way of substitution for the legacy which the Will had destined for his wife, but was an independent, distinct, substantive bequest: He therefore confirmed the judgment of the Vice-Chancellor, and dismissed the appeal (*e*).

In *Byne v. Currey* (*f*), a testator by his Will, bequeathed certain legacies to charitable institutions, and directed that they should be paid as follows, "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts, and the said legacies hereby by me given and bequeathed: " He then directed "all his legacies to be paid within two years after his decease, free of any deduction for tax or duty:" By a codicil, he bequeathed legacies payable and raiseable immediately: And the Court of Exchequer held, that the charitable legacies, and the legacies given by the codicil raiseable immediately, were payable free from Legacy duty (*g*).

(*b*) See also *Fisher v. Brierley*, 30 Beav. 267; *Johnstone v. Lord Harrowby*, 1 De G. F. & J. 428; *Re Backhouse*, [1916] 1 Ch. 65.

(*c*) 2 Russ. Chanc. Cas. 183.

(*d*) 6 Madd. 30.

(*e*) See also *Burrows v. Cottrell*, 3 Sim. 375; *Early v. Benbow*, ante, p. 6, note (*r*).

(*f*) 2 Cr. & Mees. 603; *S. C.*, 4 Tyrwh. 479.

(*g*) See accord. *Williams v. Hughes*, 24 Beav. 474.

In *Douglas v. Congreve* (*h*), a testator gave to M. S. 50,000*l.*, three per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate: And Lord Langdale, M. R., held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the Will from the payment of Legacy duty.

In *White v. Lake* (*i*), a testator gave several pecuniary and specific legacies, and directed that "all legacies and bequests" by his Will given, should be paid or satisfied free of duty, and he devised his residuary real estate to A. for life, and afterwards upon trust for sale: and Lord Romilly, M. R., held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the Will, that the Legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

In *Lord Londesborough v. Somerville* (*k*), the testator directed Legacy duty to be paid out of his general personal estate on the annuities and pecuniary legacies given by the Will: And it was held by Romilly, M. R., that the income of residuary uninvested personal estate directed to be invested in land and settled to uses, was not an annuity within such direction (*l*).

In *Noel v. Lord Henley* (*m*), a legacy was bequeathed to be paid out of the rents and profits, and the produce of the sale of a real estate devised to be sold for the payment of such legacy, *inter alia*: In a subsequent part of the Will, this legacy was

(*h*) 1 Keen, 410.

(*i*) L. R. 6 Eq. 188.

(*k*) 19 Beav. 295.

(*l*) In *Calvert v. Sabbon*, 2 Keen, 672, a testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the Legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the Legacy duty on the specific and pecuniary legacies and yearly sum given to A.: A. and the legatees in remainder, were strangers in blood to the testator; so that the same rate of duty was chargeable on the whole bequest, and the full amount of the duty payable at once. And Lord Langdale, M. R., held, that the Legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to A., and to those in remainder; inasmuch as the residuary legatee could not on A.'s death, call back any part of the duty that had been paid.

(*m*) 7 Price, 241; *S. C.*, in Dom. Proc. 12 Price, 213.

Out of what
fund the duty
is to be paid.

Exemption of
legatee for
life extended
to legatee in
remainder.

directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty: And the Court of Exchequer held, that the duty on that particular legacy must be paid out of the real fund, and not out of the personalty; the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund (*n*).

The effect of a gift free from duty in the case of settled legacies, having regard to the Finance Act, 1914, has been the subject of many decisions which are not easy to reconcile, and in several of such cases the question turned on the point whether the testator intended to provide for the payment of duties coming into operation after the date of the Will or the death of the testator. It seems, however, to be now settled that in all such cases no general rule for the interpretation of a clause freeing legacies from duty can be laid down and that the decision must rest in each case upon the language of the Will (*o*). A testator may use language which is sufficient to exempt legacies from duty imposed by an Act passed after the testator's death, and in several cases duty so imposed has been held to be payable out of residue (*p*). On the other hand the words "free of duty" may be limited to the duty payable at the death of the testator (*q*). Trustees are not bound to make provision for duty payable on the death of a tenant for life (*r*), and a direction to pay all duties out of residue does not include duties which are payable by other persons and recoverable from them by the trustees (*s*).

It may here be convenient to notice that by recent statutes certain limitations of time have been imposed on the right of the Crown to recover Legacy and Succession duties. Thus by 52 & 53 Vict. c. 7, s. 14, it is provided that no person shall, under a testamentary document admitted to probate, or under

(*n*) See also *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Wilson v. O'Leary*, L. R. 17 Eq. 419; *Re Turnbull*, [1905] 1 Ch. 726. As to the fund out of which Estate duty is payable apart from any direction in the Will, see *ante*, p. 756 *et seq.*

(*o*) *Re Palmer*, [1916] 2 Ch. 391.

(*p*) *Re Stoddart*, [1916] 2 Ch. 444; *Re Tinkler*, [1917] 1 Ch. 242; *Re Parker*, [1917] W. N. 233; *Re Kennedy*, [1917] 1 Ch. 9; *Re Eve*, [1917] 1 Ch. 562.

(*q*) *Re Palmer*, *sup.*; *Re D'Oyley*, [1917] 1 Ch. 556; *Re Snape*, [1915] 2 Ch. 179; but the latter does not lay down any general principle: see *Re Palmer*, *sup.*

(*r*) *Re D'Oyley*, [1917] 1 Ch. 556.

(*s*) *Re Briggs*, [1914] 2 Ch. 413.

letters of administration, or under a confirmation, be liable for payment of any Legacy, Succession, or Estate duty, after six years from the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account. And further that trustees, executors and administrators, are not to be liable after six years if it be proved to the commissioners that the account rendered was correct to the best of their knowledge.

Power to deposit copies of documents and liability to duty to cease after specified period.

By sect. 13 of 52 & 53 Vict. c. 7, it is provided that:—

- (1.) A person may deposit with the commissioners an attested copy of any document creating a liability for Succession or Estate duty, other than a testamentary one admitted to probate.
- (2.) A receipt is to be given by the officer of the commissioners for such document.
- (3.) After such a receipt has been given for a copy of such a document, no person is to be liable for duty under it after six years from the date of notice to the commissioners of the fact which gives rise to an immediate claim to such duty.
- (4.) The costs of depositing the copy and obtaining the receipt are to be considered duly incurred by the trustee or executor.

By 52 & 53 Vict. c. 7, s. 12, it is provided that (1) notwithstanding sect. 42, and any other provision of the Act of 1853, real property estates and interests shall not be liable as against purchasers or mortgagees for Succession or Estate duty after six years from the date of notice to the commissioners that the successor has become entitled, or from that of the first payment of an instalment or part of the duty or (where the successor has availed himself of the option given by 51 & 52 Vict. c. 8, s. 22), after two years from the time for payment of the last instalment or part of the duty, or in the absence of any such notice or payment after the lapse of twelve years from the happening of the event (whether before or after the passing of this Act) which gave rise to an immediate claim to such duty, or if such period expires within six years from the date of the passing of the Act, then after the expiration of six years from the last-mentioned date.

(2.) The duty unpaid at the end of such periods shall be paid by the successor or persons mentioned in sect. 44 of the Act of 1853, other than the purchaser or mortgagee, and be

charged upon other property comprised in the succession (unless vested in the purchaser or mortgagee), and in the case of a mortgage upon the equity of redemption.

(3.) A purchaser or mortgagee shall not for the purpose of obtaining the exemption be bound to see that the duty is discharged out of the purchase-money or loan.

The above sections 12 to 14 of the Customs and Inland Revenue Act, 1889, apply as if Estate duty were therein mentioned (*t*).

Upon this subject the intention of the testator, as apparent upon the construction of the Will, is to furnish the rule of decision (*u*). But where legacies are given generally, it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled and the Will was made; without regard to the currency of the place where the legatees reside (*x*).

In what
currency
legacies are
to be paid.

So if a testator, domiciled in England, charges his lands abroad, with legacies generally, without mentioning whether they are to be paid in sterling money or in currency, they will be payable in sterling money of England (*y*).

Where a legacy is given in a foreign country and coin, as in Sicea rupees, by a Will of a testator domiciled in India, the payment, if made by remittance to this country, must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: So as to other countries (*z*).

In *Campbell v. Graham* (*a*), a testator, domiciled in Jamaica, gave legacies in Jamaica currency, which ultimately came to be paid out of assets in England: And Sir J. Leach, M. R., held, that as there could be no expense of remittance, their value was to be computed according to the standard par of exchange

(*t*) Finance Act, 1894, s. 8 (2), *ante*, p. 747.

(*u*) *Lansdowne v. Lansdowne*, 2 Bligh, 91; *Yates v. Maddan*, 16 Sim. 613.

(*x*) *Saunders v. Drake*, 2 Atk. 466; *Pierson v. Garnet*, 2 Bro. C. C. 38; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Lansdowne v. Lansdowne*, 2 Bligh, 92; *Yates v. Maddan*, 16 Sim. 613.

(*y*) *Phipps v. Lord Anglesea*, 5 Vin. Abr. 209, pl. 8; *S. C.*, 1 P. Wms. 696; *Wallis v. Brightwell*, 2 P. Wms. 88, 89; *Lansdowne v. Lansdowne*, 2 Bligh, 91, by Lord Eldon. See also *Noel v. Rochfort*, 10 Bligh, 483; *S. C.*, 4 Cl. & F. 158.

(*z*) *Cockerell v. Barber*, 16 Ves. 461. See *Scott v. Bevan*, 2 B. & A. 78; *Manners v. Pearson & Son*, [1898] 1 Ch. 581; and see *Re Scott* [1914] 1 Ch. 847.

(*a*) 1 Russ. & M. 453.

between Jamaica and British currency, and not according to the actual rate at the time of payment.

In *Holmes v. Holmes* (b), a testator, being then domiciled in Ireland, by his Will made there prior to the stat. 6 Geo. IV. c. 79 (equalizing the currency of the United Kingdom), bequeathed an annuity: He afterwards transferred his residence to England, and died domiciled there, after the passing of that statute: And it was held by Sir John Leach, M. R., that the bequest of the annuity, though not perfected till the death of the testator, was a gift made at the time of making the Will; and, the gift being prior to the statute, that the annuity was to be computed in Irish currency.

In *Banks v. Sladen* (c), a testator gave a legacy of 12,500*l.* 4 per cent. annuities: At the making of his Will there was a stock called New 4 per cents., in which he had a small sum, and a stock called 4 per cents. consolidated, of which he was a holder to a very large amount: Before the death of the testator, the latter stock was reduced to 3½ per cent.; and another 4 per cent. stock was created: and Sir J. Leach, M. R., held that the investment of the legacy was to be made in an existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent.

In *Sheffield v. Lord Coventry* (d), a testator gave to a son a legacy of 20,000*l.* in "the joint stock of the 4 per cent. Bank Annuities, transferable at the Bank of England, commonly called 4 per cent. Bank Annuities:" The only 4 per cent. Bank Annuities existing at the date of his Will were reduced to 3½ per cent.; and afterwards, and before his death, a new stock of 4 per cent. Bank Annuities was created: And the same learned judge held, that the Will spoke at the testator's death, and the son was entitled to a sum of 20,000*l.* in the then existing 4 per cent. Bank Annuities.

SECTION VIII.

The Payment or Delivery of Specific Legacies.

Whether the legatee is entitled to any increase

With respect to the payment, or delivery, of specific legacies, a question may arise, whether the legatee is entitled to any increase, which may have happened to the subject, between the

(b) 1 Russ. & M. 660. (c) 1 Russ. & M. 216.
(d) 2 Russ. & M. 317.

date of the Will and the death of the testator: or, in other words, whether the legacy shall have relation to the one period or the other.

As to Wills made, or re-executed, or republished on or after the 1st day of January, 1838, it is enacted by stat. 1 Vict. c. 26, s. 24, that "every Will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will."

which accrued before the death of the testator:

i.e. whether the legacy shall relate to the date of the Will or death of testator:

The general rule, which was established, as to Wills of personal estate, before the passing of this statute, may, perhaps, be stated to be, that, in order to confine the bequest to the date of the Will, the expressions must refer unequivocally to the property which the testator then had; otherwise they would not be allowed to have that effect (*e*): Thus if the bequest were general, as of all the testator's goods *in* a particular house or place, whatever personal chattels were found there at the time of his death would pass, though not there at the date of the Will (*f*).

However, if the testator showed a clear intention to dispose of such goods as belonged to him in a particular place at the date of his Will, property afterwards brought there would not pass: as where the bequest is "of all such part of my personal property as is now in my house at —" (*g*). But in *All Souls College v. Coddington* (*h*), the bequest was, "I devise my library of books, now in the custody of C.; to All Souls College in Oxford;" and the testator gave to the same college 4,000*l.* more to augment their library: He afterwards bought several

(*e*) See *Parker v. Marchant*, 1 Y. & C. Ch. C. 290. See also the rule as stated by Lord Cottenham, in *Cole v. Scott*, 1 Mac. & G. 529, *ante*, p. 145, note (*f*).

(*f*) *Sayer v. Sayer*, 2 Vern. 688; 1 Rep. Leg. 220, 3rd edit. But none will pass by such a bequest, which are not *actually* in the house or place at the testator's death, however clear the intention of the testator may be to have placed them there: Thus if one bequeaths to his son the furniture of his house at D., and orders goods to be carried thither from London, and agrees with the carrier for that purpose, but dies before the goods are removed to D.; they cannot pass by the bequest: *Beaufort v. Dundonald*, 2 Vern. 739.

(*g*) 1 Rep. Leg. 220, 3rd edit.; *Dormer v. Burnet*, cited in *Downing v. Townsend*, Ambli. 281; *Att.-Gen. v. Bury*, 2 Vin. Abr. 328, pl. 2; 1 Eq. Cas. Abr. 201. See also *Smallman v. Goolben*, 1 Cox, 329. As to the effect of the word "now" in a Will to which the Wills Act applies, see *ante*, p. 145, note (*f*).

(*h*) 1 P. Wms. 597.

valuable books, which were placed in his library: And the question was, whether those books passed to the College: Sir Joseph Jekyll, M. R., determined in the affirmative, upon the construction of the word "now;" his Honour being of opinion that "now" did not relate to the books which were in the library at the date of the Will; but that it denoted where the library was; and might have been intended to distinguish that particular library from any other belonging to the testator: And his Honour observed, "if I devise all my flock of sheep now on such a hill, or in such a pasture; in that case, because sheep are in their nature fluctuating, some must die, some be killed and some lambs be produced which will afterwards breed, and it being the case of a collective body, the sheep produced afterwards shall pass; and this is within the reason of a devise of a personal estate, which, because always fluctuating, shall therefore relate to the time of the testator's death; besides the Will, as to personals, does not speak till after the testator's death."

case of
accretion :

In *Harcourt v. Morgan* (i), a testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*: when they got the principal money paid to them, they then to give their uncle, J. B., the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond: And Lord Langdale, M. R., held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal (k).

With respect to cases where the testator has bequeathed the whole of some one *genus* of his property, as "all debts due to me on bonds," or "all my stock," or "my share," or in any other way has referred to particular property, and bequeathed it by the description of all *his* property, the Court had arrived at a conclusion, before the Wills Act, that he meant only so much of the property in that state of investment as he was possessed of at the date of his Will (l). But in *Goodlad v. Burnett* (m), Sir W. Page Wood, V.-C., expressed his opinion that, since the above enactment of the Wills Act, it required some plainer indication of "contrary intention," than the mere circumstance that the testator has described stock by the words "my stock," to

(i) 2 Keen, 274.

(k) But where the express words of the gift are "300*l.* due upon a bond" they will not be extended further: *Roberts v. Kuffin*, 2 Atk. 112; and see *ante*, p. 952, note (f).

(l) *Douglas v. Douglas*, Kay, 430, 404; and see *ante*, p. 919.

(m) 1 Kay & J. 341, *ante*, p. 919, note (l).

take the case out of the statutory rule that the Will shall speak as if it had been executed immediately before his death: And his Honour accordingly held that, where a testatrix, in 1850, bequeathed thus, "I give *my* New three and a quarter per cent. annuities," the bequest comprised all the New three and a quarter per cents. which she had at her death:—And the learned judge distinguished between a reference to a particular thing, such as a ring or a horse, and a bequest of it as "my ring" or "my horse," and a bequest of that which is generic and which may be increased or diminished (*n*).

The effect of sect. 24 of the Wills Act is not to alter the law of specific legacies (*o*). The only effect is that, to ascertain what is comprised in a specific bequest, it is necessary in all cases to consider the Will as made immediately before the testator's death (*p*). There is only one exception to this rule and that is where the testator refers to the date of the Will as the point of time at which the quantum of the property is to be ascertained (*q*). There is, however, another apparent exception to the rule, which is, where a testator has used words of such a character that it is doubtful whether or not they are sufficiently extensive to cover additions to the property made between the date of the Will and that of his death. It is in the construction of gifts of this character that questions have usually arisen since the Wills Act (*r*).

Effect of
sect. 24 of the
Wills Act as
regards
specific
legacies.

(*n*) See *Douglas v. Douglas*, Kay, 400, 405. See also *Re Clifford*, [1912] 1 Ch. 29, where there was a bequest of "twenty-three of the shares belonging to me" in a certain company. At the date of the Will the shares were 80*l.* each, but at the date of the death they had been divided into four new 20*l.* shares, and it was held that as the bequest was a specific bequest of a thing that could neither be increased nor diminished there was a sufficient contrary intention, and that the bequest referred to the 80*l.* shares existing at the date of the Will. Cf. *Re Gillins*, [1909] 1 Ch. 345.

(*o*) *Per* Jessel, M. R.: *Bothamley v. Sherson*, L. R. 20 Eq. 304, 312.

(*p*) *Per* Turner, L. J.: *Langdale v. Briggs*, 8 De G. M. & G. 391, 435.

(*q*) *Cole v. Scott*, 1 Mac. & G. 529; *Douglas v. Douglas*, Kay, 400; *Hutchinson v. Barrow*, 6 H. & N. 583; *Williams v. Owen*, 2 N. R. 585; *Jepson v. Key*, 2 H. & C. 873; *Hepburn v. Skirving*, 4 Jur. N. S. 651; *Lord Lilford v. Powys Keck*, 30 Beav. 300; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229. And see *ante*, pp. 145—148.

(*r*) See for cases where the larger interpretation prevailed, *Miles v. Miles*, L. R. 1 Eq. 462; *Trinder v. Trinder*, *ibid.* 695; *Castle v. Fox*, L. R. 11 Eq. 542; *Re Ord*, 9 C. D. 667; 12 C. D. 22; *Saxton v. Saxton*, 13 C. D. 359; *Re Champion*, [1893] 1 Ch. 101; *Re Evans*, [1909] 1 Ch. 784. And for cases where the narrower, *Webb v. Byng*, 1 K. & J. 580; *Re Portal and Lamb*, 30 C. D. 50 (C. A.), explained in *Re Gillins*, [1909] 1 Ch. 345. And see generally as to the time

Bonuses accruing in the testator's life:
(a) after the Will.

(b) before the Will.

Bonuses accruing after the testator's death.

Specific legacies not to be sold without necessity:

must be got in by the executor at the expense of the general estate:

If the testator bequeaths to a specific legatee a certain quantity of Bank stock, for example 5,000*l.* standing in his name, and a bonus be given by the Bank, under the statute 36 Geo. III. c. 96, s. 3, in the interval between the date of the Will and the testator's death, the additional capital will not pass to the legatee (s). But in *Matthews v. Maude* (t), a testatrix had power to dispose by Will of property, which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l.* Bank stock which after the brother's death was increased by a bonus to 8,750*l.* The testatrix in her Will, made shortly after the bonus was declared, described the Bank stock as consisting of 7,000*l.*: And Sir J. Leach, M. R., decreed that the 8,750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother (u). And with regard to bonuses which accrue after the death of the testator, upon shares specifically bequeathed by him such bonuses belong to the specific legatee (x).

It may be observed that it is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish; and, unless compelled, they ought not to apply them to the payment of debts (y). And further, it is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise: and that the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration (z).

from which a Will speaks, *ante*, pp. 145—148, and as to the ademption of legacies, *ante*, p. 1061 *et seq.*

(s) *Norris v. Harrison*, 2 Madd. 268. See further, *Loscombe v. Wintringham*, 12 Beav. 46. But see also *Courtney v. Ferrers*, 1 Sim. 145.

(t) 1 Russ. & M. 397.

(u) See also *Carver v. Bowles*, 2 Russ. & M. 304.

(x) See *Maclaren v. Stainton*, 27 Beav. 460, 462; reversed 3 De G. F. & J. 202. See *ante*, p. 1153.

(y) *Clarke v. Lord Ormonde*, Jac. 108.

(z) *Perry v. Meddowcroft*, 4 Beav. 204; but see *Re De Sommery*, [1912] 2 Ch. 622, *infra*. As to liability on shares in joint stock companies where the interest of the testator in the subject-matter is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose. Consequently, specific legatees of shares in a banking company were held liable to pay the calls made subsequent to the

But where trustees of a Will incurred costs and paid duties abroad in respect of foreign property specifically bequeathed, they having as executors assented to the bequest, it was held that both the costs and duties must be borne by the property specifically bequeathed and not by the residue (*a*). So the upkeep of a specific legacy must be borne by the specific legatee (*b*).

It may be added, that if a testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as for instance if he has twenty horses in his stable and bequeaths six of them, the legatee, and not the executor, has the right of selection (*c*). right of selection in a legatee of a certain number of a stock of articles.

Where there is a bequest of such of a class of articles as the legatee may select he will be apparently entitled to elect to take the whole (*d*).

If it can be gathered from the words used that a testator intended to give a particular property to a legatee, but owing to his having several properties answering the description in the Will, it is impossible to say, either from the Will itself or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the Court cannot, to avoid an intestacy, construe the Will as giving the legatee the option of electing which property he will take (*e*).

There has already been occasion to point out, that if a testator should happen to direct his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, unopened, the executor cannot, consistently with his duty, comply with this direction (*f*). Specific legacy of an unopened packet.

testator's death: *Armstrong v. Burnet* (1855), 20 Beav. 424, where the earlier cases are considered; and, so far as inconsistent therewith, they must now be considered overruled. See *per* Sir W. Page Wood, V.-O., in *Re Box* (1863), 1 H. & M. 552, 559. See also *Day v. Day* (1860), 1 Dr. & Sm. 261. See *post*, p. 1323, as to the exoneration of specific legacies.

(*a*) *Re De Sommers*, [1912] 2 Ch. 622, following *Re Brewster*, [1908] 2 Ch. 365; *Re Scott*, [1914] 1 Ch. 847; *Re Grosvenor*, [1916] 2 Ch. 375.

(*b*) *Re Pearce*, [1909] 1 Ch. 819.

(*c*) *Jacques v. Chambers*, 2 Coll. 435; *Millard v. Bailey*, L. R. 1 Eq. 378; *Tapley v. Eagleton*, 12 C. D. 683.

(*d*) *Cooke v. Farrand*, 7 Taunt. 121; *Arthur v. Mackinnon*, 11 C. D. 385; *Re Sharland* (1896), W. N. 62.

(*e*) *Asten v. Astens*, [1894] 3 Ch. 260; *Re Cheadle*, [1900] 2 Ch. 620.

(*f*) See *ante*, p. 302.

SECTION IX.

Election.

Although the limits of this Treatise will not admit of a full discussion of the doctrine of Election, it is necessary to state briefly the nature of the subject, and some of the leading principles established with respect to it.

Doctrine of
election:

It is a principle of equity, that a person, who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it: If therefore a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy, by the same Will, A. will not be permitted to keep his own estate, and enjoy at the same time the fruits of the devise or bequest made in his favour, but must *elect* whether he will part with his own estate, and accept the provisions of the Will, or continue in the enjoyment of his own property, and reject that bequeathed (*g*).

It is not requisite, for the operation of this principle, that the testator should be aware that the property, of which he so undertakes to dispose, is not his own: The obligation of making an election will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequests were absolutely at his own disposal (*h*).

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's; in that case the former, the donee of the testator's property, is bound to elect whether he will give effect to the disposition of

(*g*) The foundation of election is that no one shall claim under and in opposition to the same instrument: Sug. on Powers, 8th ed. 576; cf. *per* Chitty, J., in *Re Chesham*, 31 C. D. at p. 473. See notes to the case of *Dillon v. Parker*, 1 Swanst. 396 *et seq.*, and the cases collected in 2 Rep. Leg. 482 *et seq.* 3rd edit. See also *Wollaston v. King*, L. R. 8 Eq. 165, 173, *per* James, V.-C., who states the ordinary principle to be, that if a testator gives property, by design or by mistake, which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot take both. He cannot *wilfully* defeat the intentions of the testator: *Re Macartney*, [1918] 1 Ch. 300; and see *Re Sullivan*, [1917] 1 Ir. R. 38.

(*h*) *Whistler v. Webster*, 2 Ves. 370; *Thellusson v. Woodford*, 13 Ves. 221; *Welby v. Welby*, 2 Ves. & B. 199; *Naylor v. Wetherell*, 4 Sim. 114; *Re Brooksbank*, 34 C. D. 160. When it appears that the testator meant only to dispose of the property provided he had power to do so, no case of election arises: *Church v. Kemble*, 5 Sim. 525.

his own estate in favour of the latter. This is not the case where there is no property of the testator given, but he has improperly exercised a power, so that the property will go in default of appointment. As where a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only; he appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object); it was held that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power (*i*). The case of an attempt by a testator to dispose of property which belongs to some one else must be distinguished from the case where a testator attempts by Will to exercise a power of appointment and the appointment is *ex facie* void; in which case the Will must be read as if the invalid appointment were not in it, and no case of election arises (*k*). So there is no case for election where a testator makes an appointment which is void for perpetuity (*l*), or as transgressing the rule against double possibilities (*m*), and at the same time gives the persons entitled in default of appointment property of his own.

distinction where no property of the testator is given, but he has merely invalidly exercised a power.

It is necessary, however, that the intention of the testator, to dispose of the property which is not his own, should be clear: the intention must appear by demonstration plain, by necessary implication (*n*). And it would seem that the intention must

Testator's intention must be clear on face of Will.

(*i*) *Re Fowler's Trust*, 27 Beav. 362.

(*k*) *Re Warren's Trusts*, 26 C. D. 208, and compare *Re Brooksbank*, 34 C. D. 160. See also *Re Oliver's Settlement*, [1905] 1 Ch. 191; *Re Beale's Settlement*, [1905] 1 Ch. 256; but see *Re Ogilvie*, [1918] 1 Ch. 492.

(*l*) *Re Wright*, [1906] 2 Ch. 288.

(*m*) *Re Nash*, [1910] 1 Ch. 1, overruling *Re Bradshaw*, [1902] 1 Ch. 436.

(*n*) *Rancliffe v. Parkins*, 6 Dow, 179, by Lord Eldon; *Johnson v. Telford*, 1 Russ. & M. 244; *Crabb v. Crabb*, 1 M. & K. 511; *Dillon v. Parker*, in Dom. Proc. 7 Bligh, N. S. 325; S. C., 1 Cl. & F. 303; *Clementson v. Gandy*, 1 Keen, 309; *Dummer v. Pitcher*, 5 Sim. 35; 2 M. & K. 262. See also *Langslow v. Langslow*, 21 Beav. 552; *Tomkins v. Blane*, 28 Beav. 422; *Honywood v. Foster*, 30 Beav. 14; *Re Fowler's Trusts*, 27 Beav. 362; *Maddison v. Chapman*, 1 Johns. & H. 470; *Stephens v. Stephens*, 3 Drew. 697; 1 De G. & J. 62; *Wintour v. Clifton*, 8 De G. M. & G. 641; *Box v. Barrett*, L. R. 3 Eq. 244; *Cooper v. Cooper*, L. R. 6 Ch. 15; L. R. 7 H. L. 53; *Orrell v. Orrell*, L. R. 6 Ch. 302; *Wilkinson v. Dent*, L. R. 6 Ch. 339; *Synge v. Synge*, L. R. 9 Ch. 128. Where a testator, being part owner of an undivided interest in a particular property, devised that

appear upon the face of the Will: for it seems now to be established that parol evidence is inadmissible for the purpose of showing it (*o*).

Parol evidence inadmissible.

The presumption of general intention may be rebutted by an inconsistent particular intention.

The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument (*p*). The rule of not claiming by one part of an instrument in contradiction to or while refusing to comply with another part, has exceptions; and the ground of exception seems to be a particular intention denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election (*q*). It is on this ground that it has been held, that the doctrine of election does not apply to the case of an interest which a married woman takes with a restraint on anticipation (*r*), whether the question of election is raised upon the face of two clauses in the same instrument (*s*), or whether it is raised by a married woman taking under a different instrument and refusing to comply with some covenant contained in the instrument, under which she takes the property with the restraint on anticipation (*t*), and it appears to be immaterial that pending the distribution of the testator's estate in respect of which the question arises the married woman becomes discovert (*u*). But the doctrine applies

property specifically to his co-owner, it was held that his intention was to devise the entirety and that a case of election arose against his co-owner who took a beneficial interest under the Will. But it is difficult to raise a case of election on general words only: *Re Harris*, [1909] 2 Ch. 206; and where the devise is by general words, such as "all my lands and hereditaments," or the like, no case for election arises, because there is other property of the testator's sufficient to satisfy the devise itself: *Padbury v. Clark*, 2 Mac. & G. 298; *Fitzsimons v. Fitzsimons*, 28 Beav. 417; *Whitley v. Whitley*, 31 Beav. 173; *Howells v. Jenkins*, 2 Johns. & H. 706; *Miller v. Thurgood*, 33 Beav. 496.

(*o*) *Stratton v. Best*, 1 Ves. 285; *Doe v. Chichester*, 4 Dow, 65, 76, 78, 89; *Clementson v. Gandy*, 1 Keen, 309. See the cases, *contra*, collected in the notes to *Dillon v. Parker*, 1 Swanst. 402, 403; *Pickersgill v. Rodger*, 5 C. D. 163, 171, in which case, however, *Clementson v. Gandy* and the other authorities to the same effect were not cited.

(*p*) *Re Vardon's Trusts*, 31 C. D. 275 (C. A.); reversing *Kay, J.*, 28 C. D. 124.

(*q*) 1 Swanst. 404, note.

(*r*) It should be noted that *Willoughby v. Middleton*, 2 J. & H. 344, is in effect overruled by *Re Vardon's Trusts*, *ubi supra*.

(*s*) *Re Wheatley*, 27 C. D. 606.

(*t*) *Smith v. Lucas*, 18 C. D. 531.

(*u*) *Haynes v. Foster*, [1901] 1 Ch. 361, not followed in *Re Hargrove*, *infra*; and see *Hamilton v. Hamilton*, [1892] 1 Ch. 396.

to a spinster whether the restraint is expressly confined to the period of coverture (*x*), or whether it is not in terms confined to coverture (*y*), and it applies although trustees have power in certain events (as for instance marriage without consent) to alter or revoke the trusts declared in her favour (*z*).

The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value (*a*). To what cases doctrine of election applicable:

Since election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else, it follows that the rule as to election is only applicable as between a gift under a Will, and a claim *dehors* the Will and adverse to it, and not as between one clause in a Will and another clause in the same Will (*b*).

The property *dehors* the Will must be such, that the person taking under the Will can give it up or make compensation out of it to those disappointed of the benefits intended for them under the Will; otherwise no case of election or compensation arises. And if a testator purports to devise another man's lands to a person who takes no benefit under the Will, and bequeaths a legacy to another person out of his own estate, the fact that such legatee after the testator's death acquires a title to the lands by purchase or otherwise does not put him to his election (*c*).

Under sect. 33 of the Wills Act a deceased child's estate is in the same position *quoad* the Will as if he had survived the testator, and consequently, as between his estate and disappointed legatees, the latter are entitled to put his estate to election (*d*).

It must, however, be observed, that the doctrine does not preclude a party claiming by the Will from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the Will: Thus a man may be tenant

(*x*) *Re Tongue*, [1915] 2 Ch. 283.

(*y*) *Re Hargrove*, [1915] 1 Ch. 398.

(*z*) *Ibid.*

(*a*) *Wilson v. Townshend*, 2 Ves. 697, by Lord Loughborough; *Webb v. Lord Shaftesbury*, 7 Ves. 481.

(*b*) *Wollaston v. King*, L. R. 8 Eq. 165; *Wallinger v. Wallinger*, L. R. 9 Eq. 301; *Burton v. Newbery*, 1 C. D. 234; *Bizzey v. Flight*, 3 C. D. 269; *Douglas-Menzies v. Umphelby*, [1908] A. C. 224; but see *Re Macartney*, *infra*.

(*c*) *Re Chesham*, 31 C. D. 466, 477; see *Re Macartney*, [1918] 1 Ch. 300.

(*d*) *Pickersgill v. Rodger*, 5 C. D. 163.

by curtesy of an estate tail held by his wife in opposition to a Will under which he accepts a legacy (*e*).

Nor is the doctrine applicable as against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the Will (*f*).

Heir at-law :

Previous to the Wills Act, there were some questions which arose as to whether an heir-at-law was put to his election, which cannot arise in the case of Wills made since that Act. Thus the doctrine of election was not applicable, where real property was assumed to be devised by a Will not executed so as to pass it, and by the same Will a legacy was given to the heir: In such a case the heir might take the legacy, without making good the devise (*g*); unless the imperfectly executed Will contained an express condition to that effect annexed to the legacy (*h*). Under the Wills Act, however, the requisites for a Will of realty and personalty are the same.

Again, previous to the Wills Act a testator could not effectively devise after-acquired lands, although in terms he purported to do so. But in such a case the heir-at-law taking benefits under the Will was held to be put to his election by reason of the intention appearing in the Will (*i*), even though nothing was bequeathed to him which would not have descended to him as heir, if no Will had been made (*k*).

The principle, however, on which these cases were decided, seems still to apply, the principle being, that the Court will put the legatee to his election, wherever the intention of the testator is expressed in an instrument at which the Court is entitled to look, but not where the intention is expressed in an inoperative instrument. Thus the legatee will not be put to his election

(*e*) *Cavan v. Pulteney*, 2 Ves. 544; *S. C.*, 3 Ves. 384; *Dillon v. Parker*, 1 Swanst. 408, note. See also *Brodie v. Barry*, 2 Ves. & B. 127; and Mr. Jacob's note to his edition of Roper, *Husb. & Wife*, vol. i. p. 30.

(*f*) *Kidney v. Coussmaker*, 12 Ves. 136; 1 Swanst. 408, note; 1 Pow. Dev. 437, Jarman's edit.

(*g*) *Cary v. Askew*, 1 Cox, 241; *Sheddon v. Goodrich*, 8 Ves. 481; *Brodie v. Barry*, 2 Ves. & B. 127, 130; *Gardiner v. Fell*, 1 Jac. & Walk. 23; 1 Swanst. 406, note to *Dillon v. Parker*. See also *Seaman v. Wood*, 24 Beav. 372.

(*h*) *Boughton v. Boughton*, 2 Ves. Sen. 12.

(*i*) *Churchman v. Ireland*, 4 Sim. 520; *Schroder v. Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance v. Truwhitt*, 2 J. & H. 216. But see *Johnson v. Telford*, 1 Russ. & M. 244.

(*k*) *Schroder v. Schroder*, Kay, 578; 24 L. J. Ch. 510.

where the devise of land is invalid on account of a want of capacity to devise by reason of infancy or coverture (*l*), or where the Will is not executed so as to pass real estate according to English law (*m*).

Where, however, a testator domiciled in England devises "all his real and personal estates, whatsoever and wheresoever," and has Scotch heritable bonds, which do not pass by the Will, for want of certain formalities required by the Scotch law, the Scotch heir is not put to his election, but may take English property under the Will without giving up the bonds; for the devise is held to refer only to such property as is capable of being given by such a Will (*n*).

It was formerly important to consider the question of election as applied to the case of a widow entitled to dower. But the length of time which has elapsed since the passing of the Dower Act, 3 & 4 Will. IV. c. 105, which applies to all widows married after January 1, 1834, and which in effect puts an end to questions of election in this matter, seems to make it unnecessary to consider in this Edition the effect of the authorities as formerly established.

Widow
entitled to
dower:

Where a testator makes two distinct bequests in the same Will to the same person, one of which happens to be onerous and the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy and to take the other (*o*). But, in such cases, it is a question of the intention of the testator to be gathered from the Will, whether the legatee must elect to take all, or none, of the gifts in the Will, or whether he may accept the beneficial gifts, and repudiate that which is burdensome (*p*). In cases, however, where onerous and beneficial property are included in the same gift, the legatee cannot disclaim the

Two bequests,
one onerous
and the other
beneficial.
Disclaimer.

(*l*) *Hearle v. Greenbank*, 3 Atk. 695, 715; *Rich v. Cockell*, 9 Ves. 369; 1 Swanst. 406, note, discussed in *Re Harris*, [1909] 2 Ch. 206. A married woman can now raise a case of election so as to defeat her husband's marital rights to property: *Re Harris*, [1909] 2 Ch. 206. The rule is the same where a Will, valid at the time of its execution, ceases to be valid by determination of the coverture and want of republication: *Blaiklock v. Grindle*, L. R. 7 Eq. 215.

(*m*) *Re De Virte*, [1915] 1 Ch. 920. *Secus*, where the devise of realty in a foreign country fails by the law of that country: *Re Ogilvie*, [1918] 1 Ch. 492.

(*n*) *Allen v. Anderson*, 5 Hare, 163; *Maxwell v. Maxwell*, 16 Beav. 106; 2 De G. M. & G. 705.

(*o*) *Guthrie v. Walrond*, 22 C. D. 573; *Syer v. Gladstone*, 30 C. D. 614; *Re Loom*, [1910] 2 Ch. 230.

(*p*) *Talbot v. Radnor*, 3 M. & K. 254; *Warren v. Rudall*, 1 J. & H. 1; *Guthrie v. Walrond*, *ubi supra*.

onerous and accept the beneficial unless the Will manifests a sufficient intention of the testator to the contrary. The gifts may be in substance distinct, though given by one sentence in the Will (*q*).

A disclaimer of a legacy can, before the legacy is otherwise dealt with, be retracted by the legatee (*r*).

What constitutes an election.

The inquiry, as to what acts or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle: The questions are, whether the parties acting or acquiescing were aware of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time (*s*).

A party bound to elect is entitled first to ascertain the value of the funds, and for that purpose may sustain an action to have all necessary accounts taken (*t*). An election, under a misconception of the extent of claims on the fund elected, is not conclusive (*u*).

Effect of election.

Another subject of much doubt, with respect to the doctrine of election, has been, whether the election to take against the instrument induces the necessity of relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; that it, as it is sometimes expressed, whether the principle, on which the doctrine of election proceeds, is forfeiture or compensation (*x*). The authorities, however, now establish, that compensation only is

(*q*) *Re Hotchkys*, 32 C. D. 408; *Guthrie v. Walrond*, *ubi supra*. See also *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Baron Kensington*, [1902] 1 Ch. 203; and *Honywood v. Honywood*, [1902] 1 Ch. 347; in which the above cases are discussed and the *ratio decidendi* applied; and cf. *Re Holt*, 85 L. J. Ch. 779.

(*r*) *Re Young*, [1913] 1 Ch. 272.

(*s*) See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 332, and the cases there collected; *Grissell v. Swinhoe*, L. R. 7 Eq. 291; *Cooper v. Cooper*, L. R. 6 Ch. 15; L. R. 7 H. L. 53. Where there are several next of kin, each of them may have a separate right of election, and, neither the election of the majority, nor that of the heir or administrator, will bind the others: *Fytche v. Fytche*, L. R. 7 Eq. 494.

(*t*) 1 Swanst. 332, note; *Pigott v. Bagley*, M'Clel. & Y. 576, *per* Alexander, C. B.

(*u*) 1 Swanst. 332, note.

(*x*) See the cases collected and discussed in the valuable note of Mr. Swanston to *Gretton v. Haward*, 1 Swanst. 433; and that of Mr. Jacob to his edition of *Rop. Husb. and Wife*, vol. i. p. 566.

to be made to the persons disappointed by the election to take against the instrument (*y*). The obligation of the person electing to take under the instrument appears to be confined to confirming the instrument so far as he is able, and there is no decision decreeing compensation (*z*).

Where by reason of an election to take under the instrument property is set free to pass under the instrument, that property becomes subject to all the incidents it would have been subject to had it been throughout the property of the donor (*a*).

The amount of compensation payable to the persons disappointed by the election must be ascertained at the date of the testator's death and not at the date of the election, and where the person electing against the Will has been in possession there must be an account of the rents and profits (*b*).

A person electing to take against a Will is not thereby precluded from claiming compensation from another person who by making a similar election deprives him of benefits given by the Will (*c*). ✓

Where infants are put to their election, the Court will elect for them if it be for their benefit (*d*).

SECTION X.

Refunding of Legacies.

Under certain circumstances, legatees are bound to refund their legacies, or a rateable part of them. It will, perhaps, be most convenient to consider, 1st, In what cases the executor can compel a legatee to refund; 2ndly, In what cases a creditor has that right; 3rdly, In what cases one legatee can make another refund: It will be observed, however, that the two latter of

(*y*) 1 Swanst. 442, note: But see Mr. Jacob's note, *ubi supra*, and *Greenwood v. Penny*, 12 Beav. 403. The persons disappointed by the election to take against the Will, are entitled to compensation out of the benefits given by the Will to the party so electing, in proportion to the value of the interests of which they are disappointed: *Howells v. Jenkins*, 1 De G. J. & S. 617; *Rogers v. Jones*, 3 C. D. 688.

(*z*) *Re Chesham*, 31 C. D. 466; see *Re Macartney*, [1918] 1 Ch. 300.

(*a*) *Re Williams, Cunliffe v. W.*, [1915] 1 Ch. 450.

(*b*) *Re Hancock*, [1905] 1 Ch. 16.

(*c*) *Re Booth*, [1906] 2 Ch. 321.

(*d*) *Blunt v. Lack*, 26 L. J. Ch. 148; *Lamb v. Lamb*, 5 W. R. 772; *Re Chesham*, 31 C. D. 466, 472.

these inquiries are not properly within the scope of this Treatise.

1st. When the executor can make a legatee refund.

1st. In what case the executor can compel a legatee to refund. The general rule on this subject was laid down by Sir John Strange, M. R., in *Orr v. Kaines* (e): "Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest; and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund" (f).

But where the payment of the legacy by the executor is under the *compulsion of a suit*, he is entitled to compel the legatee to refund, in case of a deficiency of assets (g).

Again, if the executor pays away the assets in legacies, and *afterwards debts appear*, of which he had no previous notice, and which he is obliged to discharge, he may compel the legatees to refund (h).

But an executor cannot compel residuary legatees to refund if he has "paid over the assets *with notice of a debt*" (i).

It seems that, formerly, legatees used to give security to the executor for refunding, if the assets should prove insufficient (k).

In *Livesey v. Livesey* (l), an annuity was bequeathed to a legatee, but he was not entitled to it until he attained twenty-one: The executrix, by *mistake*, made payments to the legatee in respect of his annuity for two years before he attained that age: And it was holden that the executrix was entitled to retain them out of the future payments of the annuity (m). So where executors inadvertently paid legacy duty on a life interest

(e) 2 Ves. Sen. 194.

(f) See also *Coppin v. Coppin*, 2 P. Wms. 296; *Re Horne*, [1905] 1 Ch. 70; but see *Re Ainsworth*, [1915] 2 Ch. 96, *infra*.

(g) *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson*, 2 Ventr. 368.

(h) *Nelthorpe v. Biscoe*, 1 Chanc. Cas. 136; *Davis v. Davis*, 8 Vin. Abr. 423, tit. Devise (Q. d.), pl. 35; 1 Rep. Leg. 398, 3rd edit.; *Doe v. Guy*, 3 East, 120, 123, *per* Lord Ellenborough.

(i) *Jervis v. Wolferstan*, L. R. 18 Eq. 18. A notice, however, of a possible remote contingent liability is *not* sufficient to disable an executor from recovering back the assets when it afterwards ripens into a debt. Notice of a liability on shares will not prevent executors calling on legatees to refund, for a liability on shares does not become a debt until a call is made: *Whittaker v. Kershaw*, 45 C. D. 320.

(k) *Chamberlain v. Chamberlain*, 1 Chanc. Cas. 257; *March v. Russell*, 3 M. & Cr. 31, 41; *ante*, p. 1081.

(l) 3 Russ. Ch. C. 287.

(m) See also *Cooper v. Pitcher*, 4 Hare, 485.

out of capital, they were allowed to retain the amount out of future payments of the annuity (*n*).

2. In what case a creditor of the testator can call on a legatee to refund. Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion (*o*): and he has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies (*p*); and although the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demand (*q*). So where a bankrupt effected policies on his life and died intestate and his administrator distributed the policy moneys among the next of kin, it was held that the

2nd. When a creditor can make a legatee refund:

(*n*) *Re Ainsworth*, [1915] 2 Ch. 96; and see *Re Musgrave*, [1916] 2 Ch. 417, where trustees paid an annuity without deducting income tax.

(*o*) *Hodges v. Waddington*, 2 Ventr. 360; *Noel v. Robinson*, 1 Vern. 94; *Anon.*, 1 Vern. 162; *Newman v. Barton*, 2 Vern. 205; *Gillespie v. Alexander*, 3 Russ. Ch. C. 136, 137, by Lord Eldon; *March v. Russell*, 3 M. & Cr. 31; *Noble v. Brett*, 24 Beav. 499; *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 25; *Hunter v. Young*, 4 Ex. D. 256, 261. An unpaid creditor has not lost his right to compel a satisfied legatee to refund even though such creditor may be the executor himself: *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 25. The proviso at the end of sect. 29 of Lord St. Leonards' Act (22 & 23 Vict. c. 35) preserves the right of creditors to follow the assets of a testator, *ante*, p. 1083. If, in an action against executors for a legacy, the executors admit assets, and judgment is given for payment of the legacy *de bonis propriis*: *Quere*, whether an unpaid creditor can call upon the legatee to refund the legacy. *Semble*, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors *de bonis propriis*: *Re Brogden*, 38 C. D. 546. It would seem that the executor need not be made a defendant, at all events in cases where he has given the notices required by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, and had at the time of distribution no notice of the plaintiff's claim: *Hunter v. Young*, 4 Ex. D. 256.

(*p*) *Hodges v. Waddington*, 2 Ventr. 360; *Thomas v. Griffith*, 2 Giff. 504. This right may be lost by laches, acquiescence, or such a course of dealing as would render the assertion of such right inequitable: *Ridgway v. Newstead*, 2 Giff. 492; *S. C.*, on Appeal, 30 L. J. Ch. 889; cf. *Re Eustace*, [1912] 1 Ch. 561. And so the right of mortgagees of real estate, whose security proves insufficient, to come against the residuary legatees of the mortgagor amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it, if there are circumstances which would make it inequitable to do so: *Blake v. Gale*, 32 C. D. 571; but they may come against other real estate: *Re Eustace*, *supra*.

(*q*) *March v. Russell*, 3 M. & Cr. 31. The rule applied in *Gillespie v. Alexander*, 3 Russ. 130 (*ante*, p. 1084), confining the liability of the legatee to a proportionate share of the debt, does not apply where the estate has not been administered by the Court: *Davies v. Nicolson* 2 De G. & J. 693.

administrator was not personally liable but that the next of kin must refund the money even though paid and received in good faith and without notice of the bankruptcy (r).'

but a purchase or mortgage is valid as against an unsatisfied creditor :

If an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. The case of an executor who is residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In this last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration; and this immunity on the part of the purchasers is not limited to cases of legal assets or to cases where the purchasers have obtained the legal estate or its equivalent (s). The immunity on the part of purchasers, however, does not exist where the executor or the Court administering the testator's estate, still retains control over the assets (t).

unless the executor, or the Court administering the estate still retains control.

3rd. When one legatee can make another refund.

3. In what cases one legatee can oblige another to refund. If the assets were originally sufficient to satisfy all the legacies, and afterwards, by the wasting of the executor, there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund, whether the legacy were paid him with or without suit (u). But if the assets were not originally sufficient to pay all the legacies, and one legatee receives his legacy in full, in

(r) *Re Bennett*, [1907] 1 K. B. 149.

(s) *Per Romer, J.*, in *Graham v. Drummond*, [1896] 1 Ch. 968. See also *Dilkes v. Broadmead*, 2 Giff. 113.

(t) *Noble v. Brett*, 24 Beav. 499; and *Hooper v. Smart*, 1 C. D. 90.

(u) *A fortiori* there can be no such right where the loss of the assets has occurred, not by the conduct of the executor, but from merely accidental circumstances: *Fenwick v. Clarke*, 31 L. J. Ch. 728. Where one of several residuary legatees, or next of kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*, if the wasting has taken place before such share was received. The burden of proof lies on those who call upon the residuary legatee or next of kin to refund, to show that the wasting took place before the share was paid over: *Peterson v. Peterson*, L. R. 3 Eq. 111. See *ante*, p. 1090.

that case the unsatisfied legatees may compel the one so paid to refund (*v*).

It would seem, that in no case where the executor is solvent, can an unsatisfied legatee maintain a suit against another who has been satisfied: because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (*x*).

But where a specific legacy given by Will had been assented to and paid, and by a codicil subsequently discovered it was found to be revoked and given to another, the latter legatee could recover from the former both the legacy and mesne income (*y*).

It remains to be considered, in what cases legatees, who are compelled to refund, shall do so with interest. On this point Lord Eldon has stated (*z*) the rule to be, "If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment, I apprehend that the rule of the Court is not to charge interest: but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share."

Legatee refunding not charged with interest.

(*v*) By Sir Joseph Jekyll, in *Walcot v. Hall*, 1 P. Wms. 495. See note (1), by Mr. Cox; *S. C.*, 2 Bro. C. C. 305. See also the observation of the Master of the Rolls in *Gillespie v. Alexander*, 3 Russ. Ch. C. 133; and *David v. Frowd*, 1 M. & K. 200. In a suit by a residuary legatee for the administration of the testator's estate the Court has jurisdiction to compel the residuary legatee to refund, for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the executor before the suit: *Prowse v. Spurgin*, L. R. 5 Eq. 99; *Re Rivers*, 88 L. J. Ch. 462.

(*x*) *Orr v. Kaines*, 2 Ves. Sen. 194; 1 Rep. Leg. 399, 3rd edit.

(*y*) *Re West*, [1909] 2 Ch. 180.

(*z*) *Gittins v. Steele*, 1 Swanst. 200; *Jervis v. Wolferstan*, L. R. 18 Eq. 18; but see *Re West*, *supra*.

CHAPTER THE FIFTH.

THE RESIDUE.

SECTION I.

*The Residuary Legatee.*¹

WHEN the executor has paid all the debts, the funeral and testamentary expenses (*a*), and all the legacies heretofore mentioned, he must, in the last place, pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated: And although the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve on his personal representative (*b*).

As to the duty of the executor to sell the personal estate, the law is thus stated by Lord Chelmsford, L. C., in *Wrightwick v. Lord* (*c*): "A residuary legatee has a right to insist that, in the course of the first year after the testator's death (*d*) the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is

(*a*) As to what are testamentary expenses, see *ante*, p. 763. There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator: *Trethewy v. Helyar*, 4 C. D. 53.

(*b*) *Brown v. Farndell*, Carth. 52; Toller, 341.

(*c*) 6 H. L. C. 217, at p. 226.

(*d*) The result of the authorities seems to be, that there is no fixed rule that conversion must take place by the end of the year, but that that is the *primâ facie* rule, and that the executors who do not convert by that time must show some reason why they did not do so; and, where the question is distinctly and fairly raised upon the pleadings, there is an onus thrown on the executors to justify the delay: *per* Sir W. Page-Wood, L. J., in *Grayburn v. Clarkson*, L. R. 3 Ch. 605. Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular circumstances: *Hughes v. Empson*, 22 B. 181.

Duty of executor as to converting the assets into money and handing over the clear residue.

the duty of the executor to sell the personal estate, or, at all events, so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses (*e*), and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences, and therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively what was the residue at the end of the year attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest" (*f*).

As to real estate, the Land Transfer Act, 1897, provides that:—

Duty of executor as to real estate: Land Transfer Act, 1897.

Sect. 2 (3). "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies" (*g*).

Sect. 3 (1). "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay (*h*), all liabilities of the personal representatives in respect of the land shall cease,

(*e*) It would seem that the executor would not be justified in selling more than sufficient to pay debts, legacies, and funeral and testamentary expenses in the case of a residuary legatee being absolutely entitled to whom he might transfer the residue in its unconverted state. See observations of Lord Cairns in *Cooper v. Cooper*, L. R. 7 II. L. 62; also *post*, Pt. III. Bk. IV. Ch. I. § 6.

(*f*) See also *ante*, p. 1117 *et seq.*

(*g*) The costs of an administration action are still payable out of real estate only so far as they have been increased by its administration: *Re Jones*, [1902] 1 Ch. 92.

(*h*) The charge provided by this section does not extend to debts for which prior to the commencement of the Act the personal repre-

except as to any acts done or contracts entered into by them before such assent or conveyance."

(2.) "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

Power to appropriate:

Sect. 4 (1) of the Land Transfer Act, 1897, contains certain provisions with regard to appropriation, but as these provisions cannot be put in force without the prescribed rules therein referred to and no such rules have been made the section remains inoperative. It does not affect the power of appropriation which existed before the Act, at any rate in cases where there is a trust for conversion (*i*).

where there is a trust or duty to convert, power unaffected by sect. 4 (1) of the Act as to giving notice and the like.

Where there is a trust for sale and conversion it is competent to the executor and trustee to agree with a person who is entitled to a share in the proceeds of the conversion to transfer to him the property, without converting it, in satisfaction *pro tanto* of the money which would be coming to him if he had converted it. It is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold. Nor is this principle necessarily confined to the case where there is a trust for sale and conversion, for it may be that the circumstances would be such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in ordinary course of administration apart from any trust for sale and conversion. Such being the principle, it is not affected by the provisions of sect. 4 (1) of the Act as to giving notice and the like (*j*).

representatives of the debtor would not be liable as regards the personal estate; and, therefore, where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which they have no notice at the date of the conveyance to the devisees: *Re Cary and Lott's Contract*, [1901] 2 Ch. 433.

(*i*) *Re Beverly*, [1901] 1 Ch. 681; Theobald on Wills (ed. 7), 464; *Re Salomons*, [1925] 1 Ch. 290. As to appropriation of real estate, see *Re Wragg*, [1919] 2 Ch. 58. A transfer of stock in satisfaction of a legacy must be stamped with *ad valorem* duty: *Dawson v. Inland Revenue Commrs.*, [1905] 1 Ir. R. 69.

(*j*) *Per Buckley, J.*, in *Re Beverly*, [1901] 1 Ch. 681. See also *Re Lepine*, [1892] 1 Ch. 210; and *Re Hall*, [1903] 2 Ch. 225. As to

Where there was no trust or duty to convert, but simply a gift of property among certain persons, it was held that executors might appropriate specific assets to a trust share of residue or transfer them to the legatee of a share, in advance of final division (*k*), but this does not apply where the legacy is contingent (*l*).

A sole executor who is also a beneficiary cannot appropriate towards his own legacy or share of residue any securities which have no market value and at his own price (*m*).

An administrator has a similar power of appropriation (*n*).

No particular mode of expression is necessary to constitute a residuary legatee: It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated (*o*).

What terms of bequest are sufficient to constitute a residuary legatee.

The following bequests have been held to constitute the donees residuary legatees under the respective Wills:—"I think there will be something left after all funeral expenses, &c., being paid, to give W. B., now at school, towards equipping him to any profession he may hereafter be appointed to" (*p*). "If there is money left unemployed, I desire it may be given in charity" (*q*). "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E. M. to do, and keep the residue for her own use

appropriation of unauthorised investments, see *Re Marshall*, [1914] 1 Ch. 192; *Re Craven*, [1914] 1 Ch. 358.

(*k*) *Re Richardson*, [1896] 1 Ch. 512. See also *Re Brooks*, [1897] 76 L. T. 771; *Re Nickels*, [1898] 1 Ch. 630; *Re Craven*, *supra*; *Re Cooke*, [1913] 2 Ch. 661.

(*l*) *Ante*, p. 1129.

(*m*) *Re Bythway*, 80 L. J. Ch. 246, distinguishing *Barclay v. Owen*, 60 L. T. 220.

(*n*) *Elliott v. Kemp*, 7 M. & W. 303; *Barclay v. Owen*, *supra*.

(*o*) *Bland v. Lamb*, 2 Jac. & W. 399; *Hearne v. Wigginton*, 6 Madd. 120; *Fleming v. Burrows*, 1 Russ. 276. The term "residuary legatee" is not of an invariable nature: it must be fashioned and moulded by the context of the Will: *Singleton v. Tomlinson*, 3 App. Cas. 404. So in a Will which contained a direct gift of real property, the "residuary legatee" was held to take the freehold estate of the testator not specifically devised: *Hughes v. Prichard*, 6 C. D. 24; but he does not take real property undisposed of by the Will where there is nothing in the context of the Will to enable the Court to read the words "residuary legatee" as "residuary devisee," *e.g.*, where there is no direct gift of real property, and where the testator had none at the date of the Will: *Re Methuen and Blore's Contract*, 16 C. D. 696; *Re Gibbs*, [1907] 1 Ch. 465. See also *Re Morris*, W. N. (1894) 85.

(*p*) *Leighton v. Baillie*, 3 M. & K. 267.

(*q*) *Legge v. Agill*, 1 Turn. & Russ. 265.

and pleasure" (*r*); "all that may remain of my money after my lawful debts and legacies are paid" (*s*); "whatever remains of money" (*t*); "all the rest of my money, however invested" (*u*); "household furniture, goods, ready money, debts, and securities" (*v*); "all other chattels" (*w*); "after these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister without any power or control of her husband" (*x*), without stating what was left by testator; "what is left, my books and furniture and other things" (*y*); "everything of every kind that I have now or may have at the time of my decease in my apartments at A. or elsewhere" (*z*); "after payment of all my just debts, I give all the remainder of money, goods and debts due to me" (*a*); "one-half of the money of which I am possessed to A. and the remainder equally between B. and C." (*b*); "the whole residue of money, except such things are are undermentioned" (*c*); "the rest of my money" (*d*); "the residue of my money" (*e*); "any little money left" (*f*).

What terms of bequest are insufficient to constitute a residuary legatee.

The following bequests have been held *not* to constitute the donees residuary legatees:—

"In case there is any money remaining" (out of proceeds of sale after certain specific legacies) "I should wish it to be given in private charity" (*g*); "three or four thousand pounds or whatever remaining sum or sums" (*h*); "I beg that the remainder of my money and effects may be expended in purchasing a suitable present for my godson D." (*i*); "whatever may remain to my account after payment of my debts and pecuniary legacies" (*j*); "such money, stocks, funds or other securities, not hereafter specially devised, as I may die possessed

(*r*) *Boys v. Morgan*, 9 Sim. 289; 3 M. & Cr. 661.

(*s*) *Rogers v. Thomas*, 2 Keen, 8; *Re Egan*, [1899] 1 Ch. 688.

(*t*) *Dowson v. Gaskoin*, 2 Keen, 14.

(*u*) *Re Pringle*, 17 C. D. 819.

(*v*) *Avison v. Simpson*, Johns. 43.

(*w*) *In the goods of Sharman*, L. R. 1 P. & D. 661.

(*x*) *Re Bassett's Estate*, L. R. 14 Eq. 54.

(*y*) *In the goods of Cadge*, L. R. 1 P. & D. 543.

(*z*) *In the goods of Scarborough*, 30 L. J. P. & M. 85.

(*a*) *In the goods of Bloomfield*, 31 L. J. P. & M. 119.

(*b*) *Re Cadogan*, 25 C. D. 154.

(*c*) *In the goods of White*, 7 P. D. 65.

(*d*) *In the goods of Bramley*, [1902] P. 106.

(*e*) *Re Smith*, 42 C. D. 302.

(*f*) *Re Douglas*, [1905] 1 Ch. 279.

(*g*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260.

(*h*) *Wrench v. Jutting*, 3 Beav. 521.

(*i*) *Borton v. Dunbar*, 2 Giff. 221; 2 De G. F. & J. 338.

(*j*) *Hastings v. Hane*, 6 Sim. 67.

of" (*k*). The naming of a "residuary legatee" does not constitute a residuary devise (*l*).

By the Wills Act, 1 Vict. c. 26, s. 25, "unless a contrary intention shall appear by the Will, such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will" (*m*).

What shall be included in a residuary devise under 1 Vict. c. 26, s. 25.

Where the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the Will, by lapse, invalid disposition, or other accident (*n*); or by acquirement subsequent to the date of the Will (*o*). "It has been long settled," said Sir William

Rights of residuary legatee generally:

(*k*) In the goods of *Aston*, 6 P. D. 203. See the cases collected, *ante*, p. 935 *et seq.*, as to restricting "goods," "chattels," and other general words, when coupled with other words of a limited signification, to things *ejusdem generis*. As to construction of the words "money," "moneys," &c., see *ante*, p. 940 *et seq.*

(*l*) *Re Gibbs*, [1907] 1 Ch. 465; but see *Re Stephen*, [1913] W. N. 210.

(*m*) As to what is a residuary devise within the meaning of this section, see *Re Brown's Trusts*, 1 K. & J. 522, from which it appears that the words in the 25th section of the Act apply to a general residuary devise and not to a devise of the rest of the property in a place where parts of the property are given beforehand to other persons: *Cogswell v. Armstrong*, 2 K. & J. 227; *Green v. Dunn*, 20 Beav. 6; *Springett v. Jennings*, L. R. 6 Ch. 333; *Re Mason*, [1901] 1 Ch. 619; [1903] A. C. 1. A devise of real estate by way of appointment which fails, or is void, falls into the residuary devise under this section, unless a contrary intention appear by the Will: *Freme v. Clement*, 18 C. D. 499. See, however, as to this case, *Holyland v. Lewin*, 26 C. D. 266; and see *Re Paul*, [1920] 1 Ch. 99.

(*n*) *Jackson v. Kelly*, 2 Ves. Sen. 285; *Kennell v. Abbott*, 4 Ves. 803; *Cambridge v. Rous*, 8 Ves. 12; *Bird v. Le Fevre*, 15 Ves. 589; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 V. & B. 3; *Leake v. Robinson*, 2 Meriv. 392; *Legge v. Asgill*, 1 Turn. 265, *in notis*; *Andree v. Ward*, 1 Russ. Chanc. Cas. 260; *Reynolds v. Kortright*, 18 Beav. 417; *Bush v. Cowan*, 32 Beav. 228.

(*o*) *Bland v. Lamb*, 5 Madd. 412; *S. C.*, confirmed on appeal, 2 Jac. & Walk. 399; *Hearne v. Wigginton*, 6 Madd. 119. See *Cox v. Bennett*, L. R. 6 Eq. 422; *Re Knight*, 34 C. D. 518. The nomination of a residuary legatee will not prevent his taking a lapsed bequest by substitution, *i.e.*, in the place of the deceased legatee, when the testator shows his intention that the residuary legatee should so take it, and there is no inconsistency between the characters of a residuary and a particular or substituted legatee to prevent it: In fact, the latter title may be more beneficial than the former upon a deficiency of assets to pay all the debts and legacies; for as residuary legatee he can claim nothing until all debts and legacies are fully paid; but as a particular or substituted legatee, his right to an equality of payment with the rest is preserved; so that, after rateably abating with them, he is entitled to receive the remainder of the legacy: 1 Rep. Leg. 429, 3rd edit.; *Rose v. Rose*, 17 Ves. 347, 352.

Grant, in *Cambridge v. Rous* (p), "that a residuary bequest of personal estate carries not only everything not disposed of, but everything that, in the event, turns out not to be disposed of." So it was observed by Sir John Leach, V.-C., in *Jones v. Mitchell* (q): "The Will as to personal estate, speaks at the time of the death of the testator, and the residuary legatee takes, not only what is undisposed of by the expressions of the Will, but that which becomes undisposed of at the death, by disappointment of the intentions of the Will."

Accordingly, where a testator bequeathed all his personal estate, *except* the money laid out in stocks, mortgages, and bonds, to A.; and as to his money in stock, and on mortgages and bonds, he gave the same to B.; and the gift to B. failed by an event analogous to a lapse; it was held that the property which was intended to be given to B. passed under the residuary bequest to A. (r).

Again, where a testatrix, by mistake, recited in her Will that she had settled upon A. a particular property, which, in fact, was still at her disposition, and the Will contained other recitals

(p) 8 Ves. 12, 25.

(q) 1 Sim. & Stu. 294.

(r) *Evans v. Jones*, 2 Coll. 516; *Blight v. Hartnoll*, 23 C. D. 218. See also *Thompson v. Whitelock*, 1 De G. & J. 490; *Re Bagot*, [1893] 3 Ch. 348. The question in such cases is, whether the property is excepted in order to take it away, under all circumstances, and for all purposes, from the person to whom the rest is given, or whether merely for the purpose of giving it to some one else: *Bernard v. Minshull*, Johns. 296, 299. And see the application of this distinction in *Re Fraser*, [1904] 1 Ch. 726, where certain chattels real were held to be excepted for all purposes from a general bequest of personal estate. Where a testator makes a residuary gift with regard to a particular fund, the question in all cases will be, whether the testator by the residuary gift gives the whole fund to the residuary legatee subject to the particular gifts, or whether he gives to the residuary legatee the balance of the fund after deducting the particular gifts. In the former case, if a particular legacy lapses, or there is an invalid disposition, the gift that fails will fall into the particular residue, in the latter case it will not. See *Champney v. Davy*, 11 C. D. 949. This question may, of course, arise equally whether the testator is dealing with his own property, or with property over which he has merely a power of appointment, and whether that power of appointment is special or general. Of the former construction, *Falkner v. Butler*, Amb. 514; *Oke v. Heath*, 1 Ves. Sen. 135; *Re Harries' Trust*, Johns. 199; *Carter v. Taggart*, 16 Sim. 423, are instances: of the latter, *Easum v. Appleford*, 5 My. & Cr. 56. In *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, the residuary gift was held to apply to the balance, only as to the general fund with which the testatrix was dealing, and to constitute a gift of the balance, subject to particular gifts out of that balance which failed. Where the gift is a gift of the residue subject to particular gifts which fail, they will fall into the residue, even though the failure does not arise from the happening or not happening of the event on which the Will directs such a gift to fall into the residue: *Re Meredith's Trusts*, 3 C. D. 757.

and bequests of other properties, and also a residuary bequest in favour of X., it was held by the Court of Appeal that the property mentioned in the recital passed under the residuary gift to X. (s).

The foundation of this general rule in respect of lapsed legacies is, that the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the Court gives effect to the general intent (t).

When, therefore, from the construction of the Will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of (u).

(s) *Re Bagot*, [1893] 3 Ch. 348; and see p. 361, where A. L. Smith, L. J., says: "I have read the cases cited, and I extract the rule of law or principle from them to be as follows: To prevent personal property which would otherwise fall into the general residue, assuming a true general residuary bequest to exist, there must be found in the Will an expression of the testator's intention not only to except such property either from the operation of the Will or from the operation of the residuary clause in the Will in favour of a particular recipient, but an intention to except it from the operation of the Will, or the residuary clause, as the case may be, whether the proposed recipient in the events which happen can take the property or not. There must be found in the Will the intention that, whether the proposed recipient can take the property or not, it shall never fall into the general residue."

(t) *Easum v. Appleford*, 5 M. & Cr. 61, 62.

(u) By the law before the passing of the Wills Act, a general bequest did not operate as an execution of a general power of appointment, unless the intention that it should so operate could be collected from the Will, but now by sect. 27 of that Act a general bequest operates as an execution of such power, unless a contrary intention appears by the Will. The result of this is, that the onus of proving that the testator did not intend to execute the power is now thrown on those who deny that the residuary bequest in question so operates. The fact of property being specifically appointed does not, if the appointment fails, show an intention that a residuary gift should not operate under sect. 27, as an execution of the power: *Re Spooner's Trusts*, 2 Sim. N. S. 129; *Bernard v. Minshull*, Johns. 276; *Re Elen*, W. N. (1893) 90; *Re Marten*, [1902] 1 Ch. 314; *Re Jarrett*, [1919] 1 Ch. 366. It will be observed that the section says "any personal estate which he may have power to appoint in any manner he may think proper," and applies therefore only to a general power, that is, a power which is general in regard to its objects, not a power that is general as regards the manner of its exercise: *Re Powell's Trusts*, 39 L. J. Ch. 188. In the case of a limited power the residuary bequest must be in such terms as to show an intention to execute the power, and must, of course, be in favour of an object of the power. But, when these conditions can be found in the residuary bequest, the power will be held to be executed; and this will be so, even though the Will contain an appointment which fails by reason of the appointee not being within the power, and the residuary legatee will in such case

Such is the case of a residuary bequest to several as tenants in common (v): The share of one, dying in the testator's lifetime,

take the portion of the fund badly appointed: *Re Meredith's Trusts*, 3 C. D. 757; *Re Hunt's Trusts*, 31 C. D. 308. There is a distinction between a general power of appointment and a limited power of appointment amongst a particular class. Where the power of appointment is general, there is a tendency to hold that the appointment, which fails as to the particular benefit intended to be bestowed on the appointee named, makes the property part of the general estate of the appointor; and thus, if a person, having a general power of appointment by Will, bequeath the fund, the subject of appointment, to executors in trust, and the trust fails as regards the particular object, the resulting trust will be in favour of the next of kin, or the residuary legatee, as the case may be, of the testator, and not in favour of the persons entitled in default of appointment: *Brickenden v. Williams*, L. R. 7 Eq. 310; *Wilkinson v. Schneider*, L. R. 9 Eq. 423. In *Easum v. Appleford*, 5 My. & Cr. 56, where the resulting trust was held to be in favour of the persons entitled in default of appointment, the ground of decision was that the words of the Will negated the intention to make the property part of the general estate, the gift being construed as the gift of the balance of the fund after deducting the amount previously given out of it, and not as a gift of the entire fund subject to the previous gift, as in *Re Harries' Trust*, Johns. 199. The question whether the donee of a general power of appointment has by his Will made the property subject to the power his own for all purposes, or has taken it out of the instrument creating the power only for the limited purpose of giving effect to the particular disposition, is a question of intention. The mere appointment of an executor is not sufficient in itself to show an intention to do so: *Re Davies' Trusts*, L. R. 13 Eq. 163; *Re Thurston*, 32 C. D. 508. See also *Re Pinède's Settlement*, 12 C. D. 667; *Re Van Hagan*, 16 C. D. 18; *Re Ickeringill's Estate*, 17 C. D. 151; *Willoughby Osborne v. Holyoake*, 22 C. D. 238; *Re Scott*, [1891] 1 Ch. 298; *Coxen v. Rowland*, [1894] 1 Ch. 406; *Re Boyd*, [1897] 2 Ch. 232; *Re Pryce*, [1911] 2 Ch. 286, 295. A power of appointment in favour of any person or persons except A. is not a general power within sect. 27, but may, it seems, become so through the death of A. at the time the power is exercised: *Re Byron's Settlement*, [1891] 3 Ch. 474. A general bequest will not operate under sect. 27 as an execution of a power to appoint by Will or codicil expressly referring to the power: *Re Phillips*, 41 C. D. 417; *Phillips v. Cayley*, 43 C. D. 222; see *Re Lane*, [1908] 2 Ch. 581, as to what is a sufficient reference. Where a general power of appointment of real estate by deed or Will has been completely exercised by deed, a general devise by the Will of the donee of the power subsequent to the deed will not *per se* amount, by virtue of sect. 27, to an exercise of a power of revocation and new appointment: *Pomfret v. Perring*, 5 De G. M. & G. 775; *Palmer v. Newell*, 20 Beav. 32; *Charles v. Burke*, 43 C. D. 223, note; *Re Brace*, [1891] 2 Ch. 671; *Re Thursby*, [1910] 2 Ch. 181. Where there is a general power and a residuary gift dealing with property of the description included in the power, the power will be executed by virtue of sect. 27, although there may be no reference in the residuary gift to the power. *Wilday v. Barnett*, L. R. 6 Eq. 193. So a pecuniary bequest not referring to a general power of appointment over personal estate may operate under sect. 27 as an execution of the power: *S. C.*, and *Re Wilkinson*, L. R. 4 Ch. 587; *Re Seabrook*, [1911] 1 Ch. 151.

(v) See *post*, p. 1206.

does not pass; because, the testator having given to each a certain proportion of his property, according to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion (*x*). So where a testator gave one-third of the residue to A., and another one-third to B., and as to the other one-third thereof, gave 500*l.* to C., and the remainder thereof to D.; and C. died in the lifetime of the testator; it was held that the 500*l.* belonged to the next of kin, as undisposed of (*y*).

So a bequest of "all stocks, shares and securities which I possess or to which I am entitled" is within the section: *Re Jacob*, [1907] 1 Ch. 445; and see *Re Doherty-Waterhouse*, [1918] 2 Ch. 269. So a general bequest contained in a Will prior to the instrument creating the power may operate as an exercise of the power, and the execution of the instrument containing the power and the circumstances under which it was executed cannot be looked at to show a contrary intention: *Boyes v. Cook*, 14 C. D. 53; *Airey v. Bower*, 12 A. C. 263. And it would appear, notwithstanding the observations of Lord St. Leonards (Sug. Pow. 8th edit. p. 306), that, even in the case of a power in a settlement created by the testator himself, it is not necessary that the Will should show an intention to defeat the settlement; but a residuary bequest, though defeating the settlement, will operate as an execution of the power, unless a contrary intention appear in the Will. See *Re Clark's Estate*, 14 C. D. 422, and the observations therein on *Moss v. Harter*, 2 Sm. & G. 458. But, although a settlement cannot be looked at to find a contrary intention, it may be looked at to see whether the general bequest complies with the power: *Phillips v. Cayley*, 43 C. D. 222; *Re Davies*, [1892] 3 Ch. 63. Where the settlor and testator were the same person and testator made one Will before and another Will after the creation of the power, and both Wills were admitted to probate, it was held that the first Will was not a due execution of the power: *Pettinger v. Ambler*, L. R. 1 Eq. 510. A codicil can be read with a Will for the purpose of ascertaining the intention of the testator in the Will: *Re Clark's Estate*, 14 C. D. 422; *Re Venn*, [1904] 2 Ch. 52, *ante*, p. 845, n. (s). A power to appoint a sum not exceeding a certain amount to be raised and applied as the donee should think fit, may be exercised by a general devisee under sect. 27: *Re Jones*, 34 C. D. 65; but see *Re Salvin*, [1906] 2 Ch. 459; *Re Wilkinson*, [1910] 2 Ch. 216. Sect. 27 has, as we have seen, no application to limited powers of appointment, that is, to powers of appointment limited as to the objects or class in whose favour they may be exercised. In such cases the question whether a residuary devise or bequest operates as an execution of the power is a question of the intention of the testator to be gathered from the terms of the Will, and it does not seem useful to set out in detail the cases in which the question of intention has been determined, because the question must in each case turn upon the terms of the particular Will and the surrounding circumstances.

(*x*) *Easum v. Appleford*, 5 M. & Cr. 56, 62.

(*y*) *Lloyd v. Lloyd*, 4 Beav. 231. See also *Skrymsher v. Northcote*, 1 Swanst. 566; *Harris v. Davis*, 1 Coll. 416; *Re Lowman*, [1895] 2 Ch. 348; *Re Whiting*, [1913] 2 Ch. 1; *Re Wilkins*, [1920] W. N. 197. See further, *Master v. Laprimaudaye*, 2 Coll. 443; *Clowes v. Clowes*, 9 Sim. 403. See also *Lightfoot v. Burstall*, 1 Hemm. & M. 546, where there was a direction that one of the shares of the residue on a certain

Again, the testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies: As where it appears to be the intention of the testator that the residuary legatee should have only what remained *after the payment of legacies* (z).

Rights of
legatee of a
particular or
partial
residue.

Again, the testator may, by the terms of the Will, so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue (a). Thus, in *Cook v. Oakley* (b), A., on board ship, made his Will, and gave to his mother, if alive, his gold rings, buttons, and chests of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his Will he was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was held that A.'s executor was legatee of a particular residue, namely, of what the testator had on board the ship; and such legacy excluded him from the general residue: But that as A.'s mother died in his lifetime, his rings, buttons, and chests of clothes lapsed into such particular residue, and devolved on his executor, not as executor, but as legatee of such particular residue (c). And even though the word "residue" be employed by the testator, yet if it appears, on the construction of the whole Will, that he meant to use it in a more restricted sense

contingency should sink into the residue, and be held and applied accordingly. See also *Humble v. Shore*, *ibid.* 550, note (a); 7 Hare, 247; *Sykes v. Sykes*, L. R. 3 Ch. 301; *Re Barker's Estate*, 15 C. D. 635. In the cases, however, of *Crawshaw v. Crawshaw*, 14 C. D. 817; 29 W. R. 68; and *Re Rhoades*, 29 C. D. 142, where in a Will there was a direction that the respective shares should "fall into the residue," it was held that they were not undisposed of by the testator, but were divisible among the other legatees. Cf. also *Re Ballance*, 42 C. D. 62. By the later case of *Re Palmer*, [1893] 3 Ch. 369 (C. A.), *Humble v. Shore* is overruled. See also *Re Parker*, [1901] 1 Ch. 408 (where *Skrymsher v. Northcote* is doubted); *Re Allan*, [1903] 1 Ch. 276; and *Re Wand*, [1907] 1 Ch. 381.

(z) *Davers v. Dewes*, 3 P. Wms. 40; *Att.-Gen. v. Johnstone*, Ambl. 577; *Gibson v. Hale*, 17 Sim. 129. It was said by Lord Eldon, in *Bland v. Lamb*, 2 Jac. & Walk. 406, that very special words are required to take a bequest of the residue out of the general rule; and see *ante*, p. 1201, note (s).

(a) Toller, 343; and see *ante*, p. 1200, note (r).

(b) 1 P. Wms. 302.

(c) See also 2 Rep. Leg. 589, 3rd edit.; *De Trafford v. Tempest*, 21 Beav. 564.

than that of its large and general sense, comprehending whatever of his personal estates in the events which happen turns out to be undisposed of, the Court is bound to construe it in such restricted sense (*d*).

Where the residuary estate is bequeathed to several persons in *joint tenancy*, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy (*e*) in the residue, their shares will survive to the others (*f*). But if the residue be given to several as *tenants in common*, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the Will, in case the death happened in the lifetime of the testator; or shall go to the personal representatives of the deceased legatee, in case his death took place after that of the testator (*g*).

Survivorship
as to residue:

in cases of
several residu-
ary legatees:

In *Perkins v. Baynton* (*h*), indeed, Lord Thurlow doubted whether there could be a joint tenancy of a money legacy, and said that there was no case of a residue given to persons, not executors, where they have been considered as joint tenants. But in *Crooke v. De Vandes* (*i*), Lord Eldon stated, that upon the doubt thus expressed by Lord Thurlow, he, at the time, looked at some of the original Wills in Doctors' Commons, where a construction had been put on them, and he made up his mind upon the point, upon which he had never had any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint tenancy; and it is upon the other side to show from some part of the context applying to that bequest, that the words are not to have their legal operation (*k*). Again, in *Jackson v.*

joint tenants:

(*d*) *Green v. Pertwee*, 5 Hare, 249; *S. C.*, *sub nom. Greer v. Pertwee*, 15 L. J. Ch. 372; *Jull v. Jacobs*, 3 C. D. 703, 705.

(*e*) As to what amounts to a severance, see *post*, p. 1214.

(*f*) *Webster v. Webster*, 2 P. Wms. 347.

(*g*) *Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 P. Wms. 489; *Painter v. Salisbury*, cited in *Bennet v. Bachelor*, 1 Ves. 67; *Peat v. Chapman*, 1 Ves. Sen. 542; *ante*, pp. 965, 1202. And see 1 Vict. c. 26, s. 33, *ante*, p. 972.

(*h*) 1 Bro. C. C. 118.

(*i*) 9 Ves. 204.

(*k*) So a joint tenancy is created by a bequest, without any words of severance to "children": *Mence v. Bagster*, 4 De G. & Sm. 162; *Williams v. Hensman*, 1 Johns. & H. 546; *Noble v. Stow*, 29 Beav. 409; *Kenworthy v. Ward*, 11 Hare, 196; *M'Gregor v. M'Gregor*, 1 De G. F. & J. 63; or "wife and children": *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Newill v. Newill*, L. R. 7 Ch. 253; or "survivors":

Jackson (l), the same learned Judge observed, that it is clear that where a residue of a personal estate, consisting of a great variety of particulars, is left to two persons, their executors, administrators, and assigns, the effect is a joint tenancy (m).

tenants in
common.

But where a money legacy or a residue is given to more persons than one, by any mode of expression *which denotes a severance*, the legatees will be tenants in common: As where the gift is to A. and B., "share and share alike" (n), or "equally to be divided between them" (o), or "respec-

Jones v. Hall, 16 Sim. 500; *Leigh v. Mosley*, 14 Beav. 605; or "next of kin": *Withy v. Mangles*, 10 Cl. & F. 215; *Baker v. Gibson*, 12 Beav. 101. *Secus*, as to "next of kin under the Statute of Distributions," where it is apparent that the testator refers to the statute as defining not only the persons who are, but also the title by which and the shares in which, they are to take: *Horn v. Coleman*, 1 Sm. & G. 169. See also *Godkin v. Murphy*, 2 Y. & Coll. 351; *Jenkins v. Gower*, 2 Coll. 537; *Bullock v. Downes*, 9 H. L. C. 1; *Re Ranking's Settlement*, L. R. 6 Eq. 601; *Re Ford*, [1902] 1 Ch. at p. 224; *Re Nightingale*, [1909] 1 Ch. 385; *ante*, p. 886, note (n). For cases where under a gift to A. and her children, a life estate is implied in the mother instead of A. and her children taking as joint tenants, see *Re Owen's Trusts*, L. R. 12 Eq. 316; *Combe v. Hughes*, L. R. 14 Eq. 415.

(l) 9 Ves. 595.

(m) See also *Swaine v. Burton*, 15 Ves. 370, 371; *Cookson v. Bingham*, 17 Beav. 262; *Morgan v. Britten*, L. R. 13 Eq. 28; followed in *Re Binning*, W. N. (1895) 116. Before the Married Women's Property Act, 1882, where a bequest was made to a husband and wife, a kind of joint tenancy was created, called a tenancy by entireties, that is to say, the husband and wife were treated as one person in law, and, as against other legatees of shares, took only one share between them, and the wife had no equity to a settlement out of that share. Since the Act the husband and wife each take one-half of the joint share, but the tenancy still remains, notwithstanding the statute, a tenancy by entireties, that is to say, the husband and wife are treated as one person, and only take one share: *Re March*, 27 C. D. 166; *Re Jupp*, 39 C. D. 148. A slight indication that the husband and wife shall each take a separate share, is sufficient to prevent the application of the doctrine that they take one share between them: *Dias v. De Livera*, 5 A. C. 123; *Re Dixon*, 42 C. D. 306; *Re Jeffery*, [1914] 1 Ch. 375. See *ante*, p. 868.

(n) *Heathe v. Heathe*, 2 Atk. 122; *Norman v. Fraser*, 3 Hare, 84; or "in equal shares": *Brown v. Oakshott*, 24 Beav. 254. The word "share," however, is not sufficient *per se* to constitute a tenancy in common: *Re Schofield*, [1918]

(o) *Bryan v. Twigg*, L. R. 3 Eq. 433; L. R. 3 Ch. 183. Where a testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share to which his, her, or their deceased parent or parents would have been entitled if living; and two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow; it was held that the two grandchildren took, *as between themselves*, as joint tenants, and not as tenants in

tively" (p), or "between them" (q), or "participato" (r). Again, where there is a bequest to A. for life, and after her decease, to her children, when they arrive at the age of twenty-one years, it has been decided that the children who attain twenty-one will necessarily take as tenants in common, though there are no words of severance used in the bequest; because, it has been said, it is contrary to the rule of law that persons, who are to take at different times, can take as joint tenants (s). A devise of real estate in trust for all and every the children of my daughter R., their heirs and assigns, for ever was held to create a joint tenancy (t). Where, however, words which, according to the ordinary rule, constitute a tenancy in common, are combined with, or followed by, others which would make a

common: *Bridge v. Yates*, 12 Sim. 645. See also *Amies v. Skillern*, 14 Sim. 428; *Penny v. Clarke*, 1 D. G. F. & J. 431, 432; *per* Turner, L. J., *Leak v. M'Dowall*, 32 Beav. 28; *Lamphier v. Buck*, 2 Dr. & Sm. 484; *Heasman v. Pearse*, L. R. 11 Eq. 522; L. R. 7 Ch. 275; *Hodges v. Grant*, L. R. 4 Eq. 140; *Re Woolley*, [1903] 2 Ch. 206.

(p) *Heathe v. Heathe*, 2 Atk. 122. So if there be a bequest to A. for life, with remainder to B., C. and D., with a substitutional gift of their "respective shares," in case of the death of any of them; B., C. and D. take as tenants in common: *Ive v. King*, 16 Beav. 46. See also *Shepherdson v. Dale*, 12 Jur. N. S. 156; as to which case, however, see *per* North, J., in *Re Yates*, [1891] 3 Ch. 53. But a bequest, in case of the death of any one of several legatees before his or her share shall become payable, "to his or her children respectively," is a gift to such children as joint tenants: *Re Hodgson's Trusts*, 1 K. & J. 178.

(q) *Lashbrook v. Cock*, 4 Mer. 70; *Richardson v. Richardson*, 14 Sim. 526; *Att.-Gen. v. Fletcher*, L. R. 13 Eq. 128. A gift to two, "with benefit of survivorship," as to a moiety, is a tenancy in common: *Paterson v. Rolland*, 28 Beav. 347. See also *Haddelsey v. Adams*, 22 Beav. 266; *Ryves v. Ryves*, L. R. 11 Eq. 539. A gift of a residue to be equally disposed of between five of the testator's children, whom he named, is a gift to them as tenants in common: *In the goods of Pile*, 2 Sw. & Tr. 628. See further as to what are words of severance: *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Re Wilford's Estate*, 11 O. D. 267; *Re Woolley*, [1903] 2 Ch. 206.

(r) *Robertson v. Fraser*, L. R. 6 Ch. 696; in which case Lord Hatherley said (p. 699) that "anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy." Thus a power of advancement is inconsistent with a joint tenancy: *Re Dunn*, [1916] 1 Ch. 97.

(s) *Woodgate v. Unwin*, 4 Sim. 129. This reason is ill-founded (see *Kenworthy v. Ward*, 11 Hare, 196; *M'Gregor v. M'Gregor*, 1 De G. F. & J. 63). But the decision itself, may, it would seem, be supported on the ground that all joint tenants must take the same quantity of interest, whereas in that case some of the co-tenants might take vested, others contingent interests, *ibid*. Where, however, there is a gift to A. for life, and afterwards to his children, and the vesting of their shares is not made contingent on attaining twenty-one, they take as joint tenants, notwithstanding they came into *esse* at different periods: *Ruck v. Barwise*, 2 Dr. & Sm. 510.

(t) *Re Binning*, W. N. (1895) 116, following *Morgan v. Britten*, L. R. 13 Eq. 28.

tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take: As where there is a bequest to two persons "respectively in equal shares" of the interest and dividends only of the residue of the testator's estate, and the *corpus* of the residue is not to be divided or possessed until after the decease of the two, and then it is to be divided amongst such of their children only as shall be living at the death of the survivor, *per capita* and not *per stirpes* (u).

Words of survivorship: to what period they refer.

A considerable difficulty arises where words of severance are used in the bequest, sufficient to constitute a case of tenancy in common accompanied by words of survivorship, inconsistent with such a tenancy; as if a residue be bequeathed to two or more equally to be divided between them, *and the survivors or survivor of them* (x). In *Cripps v. Wolcott* (y), Sir J. Leach, V.-C., said, that he considered it now settled, that in the case of such a bequest, if there be no special intent to be found in the Will, the survivorship is to be referred to the period of division: And that if no previous interest be given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy; But, if a previous life estate be given, then the period of division is the death of tenant for life, and the survivors at such death will take the whole legacy (z).

(u) *Pearce v. Edmeades*, 3 Y. & C. 246; *Re Tate*, [1914] 2 Ch. 182; *Re Firth*, [1914] 2 Ch. 386. See also *McDermott v. Wallace*, 5 Beav. 142; *Vanderplank v. King*, 3 Hare, 1; *Abrey v. Newman*, 16 Beav. 431; *Begley v. Cook*, 3 Drew. 662; *Cranswick v. Pearson*, 31 Beav. 626; *Edwardes v. Jones*, 33 Beav. 348; *Re White's Trusts*, 1 Johns. 656; *Re Phené's Trusts*, L. R. 5 Eq. 346; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Bryan v. Twigg*, L. R. 3 Ch. 183; *Jennings v. Hanna*, [1904] 1 Ir. R. 540; *Re Hobson*, [1912] 1 Ch. 626; *Re Schofield*, *sup.*

(x) See *Taaffe v. Conmee*, 10 H. L. C. 64, 78, as to the validity of such a limitation, and the distinction between such a survivorship, and that involved in an estate of joint tenancy. See also *Haddelsey v. Adams*, 22 Beav. 266.

(y) 4 Madd. 15, applied in *Re Poultney*, [1912] 2 Ch. 541.

(z) This rule has been frequently recognised and acted upon, and is now fully established: *Re Poultney*, [1912] 2 Ch. 541. But although, according to the doctrine of *Cripps v. Wolcott*, survivorship is to be referred to the period of distribution, that is, where the gift is immediate to the death of the testator, so as to make it merely a provision against lapse, yet the doctrine will not apply if the words of the Will show that the survivorship is to be referred to a period other than that of distribution. Thus in *Bowers v. Bowers*, L. R. 5 Ch. 244, the Court of Appeal, reversing the decision of Malins, V.-C., held that where there was an immediate gift to four residuary legatees and

But although the rule in *Cripps v. Wolcott* is conformable to reason and common sense, yet a testator is not bound to adopt that mode of disposing of his property; and if he express a different intention according to the natural import of the words of his Will, the Court must carry that intention into effect (a).

devises in equal shares, with benefit of survivorship in case any of them should die without issue, and in case any of them should die leaving children, then the shares whether original or accruing of each so dying to go to such children, that the clause of survivorship and the limitation over to the children of the legatees were not confined to the lifetime of the testator, and intended merely to guard against lapse, and that the residuary legatees did not upon surviving the testator at once acquire indefeasible interests in their shares: and Lord Hatherley in his judgment repeated a disapproval which he had previously expressed (in *Cooper v. Cooper*, 1 K. & J. 658) of the doctrine laid down in *Clayton v. Low*, 5 B. & Ald. 656, that where a testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty, and then treat the case as if the gift over were simply in case he shall happen to die and restrict the happening of that event to the testator's lifetime in order to satisfy the words importing contingency. Nor does the case of *Home v. Pillans*, 2 M. & K. 15 (as to which see *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, 397), decide that indefeasible vesting is not without absolute necessity to be suspended beyond the period of distribution; for though the Court no doubt leans to that construction, yet it cannot on that ground depart from the plain natural meaning of the words which the testator has used. See *Corneck v. Wadman*, L. R. 7 Eq. 80, in which case the words "with benefit of survivorship" were held to refer to the period when the shares of the children became absolutely vested and not to the time of payment; and *Marriott v. Abell*, *ibid.*, 478. See also *Woodroffe v. Woodroffe*, [1894] 1 Ir. R. 303; and *Re Schnadhorst*, [1901] 2 Ch. 338, 342; [1902] 2 Ch. 234. The rule was formerly thought to be otherwise as to real estate; it being considered that indefinite words of survivorship should be referred to the death of the testator, but it has been expressly decided by the Lords Justices that the rule applies to real as well as personal estate: *Re Gregson's Estate*, 2 De G. J. & Sm. 428. As to the period to which the word "then" is to be referred, in a bequest to a class of persons "then living," see *Archer v. Jegon*, 8 Sim. 446; *Gaskell v. Holmes*, 3 Hare, 438; *Re Edgington's Trusts*, 3 Drewr. 202; *Olney v. Bates*, *ibid.* 319; *Heasman v. Pearce*, L. R. 11 Eq. 522, 7 Ch. 660.

(a) *White v. Baker*, 2 De G. F. & J. 55; *Wilmott v. Flewitt*, 11 Jur. N. S. 820; *Evans v. Evans*, 25 Beav. 81. Thus the rule may not be applicable where the question is as to the effect of words referring to survivorship in divesting a vested interest, especially in instances of gifts to children after the determination of a previous life estate. See *Bouverie v. Bouverie*, 2 Phil. Ch. C. 349; *Tribe v. Newland*, 5 D. G. M. & G. 236; *Knight v. Knight*, 25 Beav. 111; *Evans v. Evans*, *ubi supra*; *Berry v. Briant*, 2 Dr. & Sm. 1. And see *Re Pickworth*, [1899] 1 Ch. 642, where *White v. Baker*, *ubi supra*, was discussed and distinguished by Lindley, M. R., and Rigby, L. J. So where there was a gift for life followed by a gift to the surviving children of B. and C., or their heirs and assigns, it was held that the rule did not apply, and that the period of survivorship was the death of the testator: *Re Hopkins' Trusts*, 2 Hemm. & M. 411. But it must

“Survivor”
construed
“other.”

It may be here mentioned, that the word “survivor” has been construed “other,” to give effect to the apparent intention (*b*). Thus where a fund is given between a class or number of persons as tenants in common for life, with interests in the nature of remainders to their children respectively, and a valid provision is made that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the words “survivors or survivor” may, if the scheme of the Will requires it, be considered as an expression of contrast used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning “others or other” (*c*):

be taken as the deliberate doctrine of the Court to apply the rule in every case where no very cogent reasons militate against such a construction, *ibid.* 414.

(*b*) See *ante*, p. 849, note (*u*), where other cases on this subject are set out.

(*c*) The case of *Lucena v. Lucena*, 7 C. D. 255, seems to establish the following propositions: (i.) That where there is a gift to children in shares, and a gift over to the surviving children of the share or shares of those dying without issue, coupled with a gift over in the case of all the children dying without issue, the word “surviving” will, in the absence of anything in the Will to show a contrary intention, be construed “other.” (ii.) That this construction will obtain even though some of the shares are settled and some not. (iii.) That, if all the shares are settled, the word “surviving” may be construed not as “others,” but as meaning those who survive actually in person, or figuratively in issue, taking an interest under the Will; but that, if some shares are settled and some are not, this construction is not admissible. In the absence of a gift over in the event of the death of all the children of the testator taking shares under the Will, the fact that the original shares are all settled by the Will, and that the accruing shares which the survivors take in the share of a child who dies without issue are settled in the same way as the original shares, is not by itself sufficient to show that the word “survivors” is used otherwise than in its proper sense. *Re Benn*, 29 C. D. 839. There are cases which seem to support the contention that a settlement of shares without an ultimate gift over is sufficient, but it has never been decided that it is so, and none of the latter cases tend to recognise it as by itself sufficient: *per* Cotton, L. J., *ibid.* p. 269, whose dictum on this point was followed by Joyce, J., in *Re Bilham*, [1901] 2 Ch. 169. It will be observed that in *Waite v. Littlewood*, L. R. 8 Ch. 70, the case in which Lord Selborne first suggested what may be called the stirpital construction of the word “surviving” or “survivors,” there was an ultimate gift over in the event of the death of all the children. See also *Re Bilham*, *ubi supra*, distinguished in *Re Friend*, [1906] 1 Ch. 47. *Wake v. Varah*, 2 C. D. 348, is another instance where the ultimate gift over on the death of all the children of the testator without issue led to the word “survivor,” in a clause of accruer, being construed “other.” In *Beckwith v. Beckwith*, 46 L. J. Ch. 98, where the Will was very similar, but there was no ultimate gift over in the event of the death of all the children, the Court construed “survivor” strictly, and refused to adopt the stirpital construction. Cf. also *Re Robson*, W. N. (1899) 260; *Milsom v. Awdry*, 5 Ves. 465. The

But the word "survivor" must receive its natural construction, and not be read as meaning "other," unless the nature of the

importance of the gift over on failure of issue of all the objects as justifying the construction of "surviving" or "survivors" otherwise than literally, is dwelt on by Kay, J., in his judgment in *Re Bowman*, 41 C. D. 525, 531, where he says that the decisions seem to him to establish the following propositions: (1) Where the gift is to A., B., and C., equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life, with remainder to their children, only children of survivors can take under the gift over. See *Re Horner's Estate*, 19 C. D. 186; *Re Benn*, 29 C. D. 839; *Garland v. Smyth*, [1904] 1 Ir. R. 35. (2) If to similar words there is added a limitation over, if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. See *Waite v. Littlewood*, L. R. 8 Ch. 70; *Wake v. Varah*, 2 C. D. 348; *Badger v. Gregory*, L. R. 8 Eq. 78; *Powell v. Hellicar*, [1919] 1 Ch. 138. The third proposition enunciated by Kay, J., was to the effect that they also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children, to the surviving tenants for life and their respective children, in the same manner as their original shares. This third proposition was, however, dissented from in *Re Robson, ubi supra*, in *Harrison v. Harrison*, [1901] 2 Ch. 136, and (by the Court of Appeal) in *Inderwick v. Tatchell*, [1901] 2 Ch. 738; [1903] A. C. 120. See also *Re Robbins*, 78 L. T. 218, where *Re Bowman* was distinguished. It will be seen from the above propositions that the learned judge did not consider a general gift over on the extinction of the class an absolute *sine quâ non*. It will be remembered, as is pointed out in this judgment, that although there may be older decisions which seem to show that "survivors" may easily be construed "others," yet the tendency of modern decisions is to adhere as closely as may be to a literal construction, and, only in cases of ambiguity to adopt that possible meaning of words, which is most in conformity with the general scheme of the Will, and avoid the consequence which the testator can hardly have deliberately intended. So again, in the case of *King v. Frost*, 15 A. C. 548, Lord Macnaghten says that the construction of the words "survivors and survivor" as "others or other" is not to be adopted, unless it is required to carry out an intention apparent on the face of the Will which would otherwise remain unfulfilled. It will be observed in that case it was sought as an alternative construction to construe "survivor" as "longest liver," and to say that the "longest liver" dying without issue, took under the accruer clause the share which had been given to him for life with remainder to his children in tail, on his own death as the survivor. This construction was based on decisions of Jessel, M. R., in *Madan v. Taylor*, 45 L. J. Ch. 539, of Fry, J., in *Davidson v. Kimpton*, 18 C. D. 213; and of Chitty, J., in *Re Roper's Estate*, 41 C. D. 409, but Lord Macnaghten refused to adopt this construction whereby the longest liver as survivor would on his own death without issue take indefeasibly the share originally intended for him and his children. The view adopted by Lord Macnaghten adverse to the decisions in the above cases seems to have been the view adopted by Kay, J., in *Re Mortimer*, 54 L. J. Ch. 414, and North, J., in *Askew v. Askew*, 57 L. J. Ch. 629, subsequently to the decision of Jessel, M. R., and also the view adopted by Sir W. Page Wood in *Re Corbett's Trusts*, Johns. 591, prior to that decision. And see also *Ranelagh v. Ranelagh*, 41 W. R. 549; *Olphert v. Olphert*, [1903] 1 Ir. 326.

disposition itself, or the context of the Will, renders a departure necessary to effectuate the apparent intention of the testator (*d*).

Survivorship
in case of a
gift as to a
class.

In *Barber v. Barber* (*e*), a testator by his Will directed, that in the event of the death of his son and daughter under twenty-one, the property bequeathed to them should devolve on and become the property of four persons, *each particularly named and described*, to be divided betwixt them in equal proportions, and to their heirs for ever; which last-mentioned four persons he appointed executors, and he afterwards appointed two other executors: One of the four persons, and also both of the after appointed executors, renounced probate, and declined to act: It was not disputed that the bequest made to these four persons was made to them *as executors*: that is, on condition that they took upon themselves that office, and consequently, that the one who had renounced could not claim his share (*f*): But on the one hand, it was insisted that his share was a lapsed legacy, and went to the next of kin of the testator; while, on the other hand, the three other persons named as residuary legatees with him who had renounced, contended that they were entitled to the residue in thirds, including, therefore, the share destined for him: Lord Cottenham decided that they were not so entitled, but that the share had become undisposed of, and belonged to the next of kin: And his Lordship, in giving judgment, made the following observations:

"This, as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the

(*d*) *Crowder v. Stone*, 3 Russ. 217; *Cromek v. Lumb*, 3 Y. & Coll. 565; *Leeming v. Sherratt*, 2 Hare, 14; *Smith v. Osborne*, 6 H. L. C. 375, 393; *Re Horner's Estate*, 19 C. D. 186; *Re Benn*, 29 C. D. 839; *King v. Frost*, *ubi supra*. "Survivors" has never been read "others" when the gift over is to a separate and distinct class: *De Garagnol v. Liardet*, 32 Beav. 608. When the word "survivor" is applied to a class of persons and individuals of that class are named, its natural meaning is "the longest liver of those who are named:" *Taaffe v. Conmee*, 10 H. L. O. 64.

(*e*) 3 My. & Cr. 688.

(*f*) See *ante*, p. 1026.

legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C. and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might at the time constitute the class, or to certain individuals, who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained: but the more important inquiry is, whether the authorities justify and support this view of the case."

Then, after dealing with the authorities (including *Knight v. Gould* (*g*), his Lordship proceeds:—

"The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page v. Page* (*h*), decided by Lord King and approved by Lord Talbot, and in two cases approved and acted upon by Lord Hardwicke; whereas, in support of the claim of the acting executors, there is only the case of *Hunt v. Berkley* (*i*), decided, indeed, by a high authority, Sir Joseph Jekyll, but disapproved by Lord Hardwicke, and overruled by every subsequent case in which the point has arisen. . . . This case, therefore, has nothing in common with *Knight v. Gould* (*k*), or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might, at the time, be the executors, it must be such of the executors named as might, at the time, be also of the number of the residuary legatees named; but that is only another mode of describing the residuary legatees; and, if their situation as residuary legatees be con-

(*g*) 2 M. & K. 295, see *ante*, p. 969.

(*h*) 2 P. Wms. 489.

(*i*) Mosely, 47; *S. C.*, 1 Eq. Abr. 243.

(*k*) 2 M. & K. 295, see *ante*, p. 969.

sidered, they are only tenants in common of the residue, between whom there can be no survivorship" (*l*).

In case of several executors entitled as such to the residue:

It must here be observed, that where co-executors take a residue in that character, they take as joint-tenants: Therefore if one of them dies after the death of the testator, but before the severance of the joint tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded, as well as the next of kin of the testator (*m*). Thus, in *Baldwyn v. Johnson* (*n*), where two executors divided a part of the testator's property, but lodged a sum in the funds for securing the payment of an annuity; it was held, that as to this they were joint-tenants, and that it would survive upon the death of one to the other (*o*). So in *Griffiths v. Hamilton* (*p*), all the executors died except two, Hoare and Griffiths: Hoare alone proved and died: After his death Griffiths proved: And he was declared entitled, as surviving executor, to all the testator's personal estate not reduced into possession and divided before the death of Hoare.

what is a severance of the joint tenancy.

The question as to what shall amount to a severance of the joint-tenancy, was much considered in the case of *Gould v. Kemp* (*q*). There a testatrix bequeathed the residue of her property "to my executors, hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their trouble, equally between them. I do nominate, constitute, and appoint my said trustees, James Kemp, James Kemp the younger, and John Prior Ward, to be executors of this my Will:" James Kemp the elder died in the lifetime of the testatrix; and it was held, that as the gift was to the three, as a class, in their official character, the whole

(*l*) See also *Re Gibson*, 2 Johns. & H. 656, and the *dictum* of Wood, V.-C., as to the case of *Knight v. Gould*, *ante*, p. 969, note (*e*). See also *ibid.*, and *ante*, p. 966, note (*n*), where the cases are collected as to what is a gift to a class. See further *Gould v. Kemp*, 2 M. & K. 304, and *Re Colley's Trusts*, L. R. 1 Eq. 496. Where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator: *Habergham v. Ridehalgh*, L. R. 9 Eq. 395, 400.

(*m*) *Frewen v. Relfe*, 2 Bro. C. C. 220; *White v. Williams*, 3 V. & B. 72; *S. C.*, Cooper, 58. See also the judgment of Lord Brougham, in *Knight v. Gould*, 2 M. & K. 299—303.

(*n*) 3 Bro. C. C. 455.

(*o*) But in *Partridge v. Pawlet*, 1 Atk. 467, Lord Hardwicke laid it down as a rule, that if two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

(*p*) 12 Ves. 298.

(*q*) 2 M. & K. 304.

residue vested in the two survivors (*r*): James Kemp the younger and Ward proved the Will, and took on them the office of executors: Some years afterwards, but before any severance of the residuary property had been made, a letter was written and delivered by Kemp to Ward, who at the time was confined to his bed by sickness, engaging to 'secure to his family, in any way he might desire by his Will, a moiety of the property bequeathed to them by the Will of their testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that this letter amounted to a severance of the joint tenancy.

Again, where leasehold property was given by Will to two sisters as joint tenants and they mutually agreed to bequeath it in trust for each other for life and for their nieces after the death of the survivor, and, one sister having died, the survivor made a Will giving the property in a different manner, it was held that the agreement between the sisters, carried out by the making of the Will, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common (*s*).

The several receipts by joint tenants of a portion of the trust fund does not destroy the joint tenancy as to the remainder of the fund (*t*). Nor does the employment by them of the estates bequeathed in their partnership trade (*u*). Nor is the marriage of one of them being a daughter a severance, unless the marriage divests the property from the wife and vests it in the husband (*x*).

What is not
a severance of
the joint
tenancy.

(*r*) See *ante*, p. 969.

(*s*) *Re Wilford's Estate*, 11 C. D. 267; *In the estate of Heys*, [1914] P. 192.

(*t*) *Leak v. McDowall*, 32 Beav. 28.

(*u*) *Brown v. Oakshott*, 24 Beav. 254. See further as to what amounts to a severance of joint tenancy, *Williams v. Hensman*, 1 Johns. & H. 546; *Caldwell v. Fellowes*, L. R. 9 Eq. 410; *Baillie v. Treharne*, 17 C. D. 388; *Burnaby v. Equitable Rev. Int. Soc.*, 28 C. D. 416; *Re Hewett*, [1894] 1 Ch. 362; *Palmer v. Rich*, [1897] 1 Ch. 134.

(*x*) *Re Butler*, 38 C. D. 286 (overruling on this point *Baillie v. Treharne*, 17 C. D. 388). From which case it appears that by the common law marriage effects a severance only with regard to the chattels personal in possession of the wife, not with regard to chattels real, or choses in action. See also *Re Barton's Will*, 10 Hare, 12, and *Armstrong v. Armstrong*, L. R. 7 Eq. 518. But since the passing of the Married Women's Property Act, 1882, marriage, it would seem, no longer operates as a severance of the wife's interest as joint tenant except in case of property of a married woman not affected by that Act.

SECTION II.

The Right of the Executor to the Residue, in case there is no Residuary Legatee.

If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin: But if the testator appointing an executor makes no disposition of the residue, a question arises whether it shall belong to such executor or to the next of kin: And this is an inquiry which has given rise to much litigation and difficult discussion: But since the passing of the Executors Act, 1830 (1 Will. IV. c. 40), this subject has been freed from the great variety of distinctions which were formerly established with respect to it.

Rule at law
prior to 1830.

At law, it was the rule, from the earliest period, that the whole personal estate devolved on the executor: and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there should be any surplus, it should vest in him beneficially (*y*).

Rule in
equity.

In equity, *primâ facie*, the rule was the same as at law (*z*). But the rule was controlled in equity, in all cases where a necessary implication or strong presumption appeared, that the testator meant to give only the *office* of executor, and not the beneficial interest in the residue: In all such cases, the executor was considered a trustee for the next of kin of the testator; or in cases where no next of kin can be found, a trustee for the Crown (*a*).

1 Will. 4,
c. 40.

Such being the state of the jurisdiction of the Courts of Equity in cutting down the right of the executor, the Executors Act, 1830 (1 Will. IV. c. 40), was passed, which, after reciting that "testators by their Wills frequently appoint executors, without making any express disposition of the residue of their personal estate: and whereas executors so appointed become by law entitled to the whole residue of such personal estate; and

(*y*) *Att.-Gen. v. Hooker*, 2 P. Wms. 340; *Southcot v. Watson*, 3 Atk. 228; *Urquhart v. King*, 7 Ves. 225.

(*z*) See Lowndes on Legacies, 249, 250.

(*a*) *Middleton v. Spicer*, 1 Bro. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8, 12; *Russell v. Clowes*, 2 Coll. 648; *Cradock v. Owen*, 2 Sm. & G. 241; *Re Bond*, [1901] 1 Ch. 15. The law is not altered by stat. 1 Will. IV. c. 40, s. 2: *Johnstone v. Hamilton*, 11 Jur. N. S. 777, *coram* Stuart, V.-C. See *post*, p. 1218, note (*d*).

Courts of Equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate (*b*); and whereas it is desirable that the law should be extended in that respect," proceeds to enact, "that when any person shall die, after the first day of September next after the passing of this Act, having by his or her Will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the Will or any codicil thereto, that the person or persons so appointed executor or executors, was or were intended to take such residue beneficially" (*c*).

after 1st Sept. 1830, executors to be deemed to be trustees for persons entitled to any residue under the Statute of Distributions, unless otherwise directed by Will:

And by the second section it is further provided and enacted, "That nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of" (*d*).

not to affect rights of executors where there is not any person entitled to the residue.

(*b*) See *Stewart v. Stewart*, 15 C. D. 539, 543, where Jessel, M. R., discusses the effect of the statute.

(*c*) This Act provides only for the case in which the property is vested in the executor *by virtue of his appointment*, and that it does not apply to a case where he takes it by virtue of an express gift: *Williams v. Arkle*, L. R. 7 H. L. 606, 615; *Re Roby*, [1908] 1 Ch. 71; but see *Love v. Gaze*, 8 Beav. 472; *Saltmarsh v. Barrett*, 29 Beav. 474; 3 D. G. & F. 279. The Act merely shifts the burden of proof and was meant to cast on the executor the burthen of proving, from the testamentary instrument, a distinct intention that he should take the residue beneficially: *Juler v. Juler*, 29 Beav. 37; *Williams v. Arkle*, L. R. 7 H. L. 606; *Re Roby*, [1908] 1 Ch. 71. For instances where it has been held that such an intention did not sufficiently appear, see *Juler v. Juler*, 29 Beav. 34; *Re West*, [1900] 1 Ch. 84; and for instances where it has been held that it did sufficiently appear, see *Harrison v. Harrison*, 2 Hemm. & M. 237; *Shepherd v. Nottidge*, 2 Johns. & H. 766. The trusteeship of executors created by 1 Will. IV. c. 40, was not intended to be different in its nature from that which existed previously, under the rule established in Courts of Equity, namely, that in the absence of special circumstances executors were not to be regarded as express trustees: *Re Lacy*, [1899] 2 Ch. 149.

(*d*) The statute, it would seem, has made no alteration in the law

It is necessary, however, with relation to questions which may yet arise respecting Wills of persons who have died previously to September 1st, 1830, and respecting Wills to which the statute does not apply by reason of the residue being expressly disposed of (*e*), or by reason of the deceased having left no next of kin (*f*), to review briefly the grounds on which the Courts of Equity had proceeded, until the time of the passing of the above Act, in deciding either that the executor was entitled to the residue beneficially, or that he was merely a trustee for the next of kin.

What is sufficient in cases not within the Act, to raise a presumption against the executor's title:

the words "in trust":

For this purpose it is necessary to consider what circumstances have been held sufficient to raise that presumption, which, according to the rule above laid down, must exist, in cases not within the statute, in order to preclude the executor from taking the residue beneficially.

In the first place, where the executor is expressly appointed *in trust* (*g*), or the residue is bequeathed to him *in trust* (*h*), though no trusts are declared (*i*), or though the trusts declared do not exhaust the whole property (*k*), he shall be a trustee for

except in cases where the deceased has left next of kin: *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Coll. 648; *Re Bacon's Will*, 31 C. D. 460, 463. See also *Chester v. Chester*, L. R. 12 Eq. 444. Cf. also *Re Bond*, [1901] 1 Ch. 15, where the Will contained a legal devise to a tenant for life, and nothing more; the tenant for life sold under the powers of the Settled Land Acts; and it was held, distinguishing *Taylor v. Haygarth*, *ubi supra*, that on the death of the tenant for life the proceeds of sale went to the Crown as *bona vacantia*, in the absence of any heir-at-law. If there are no next of kin, and no intention is disclosed on the face of the Will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown: *Russell v. Clowes*, 2 Coll. 648; *Att.-Gen. v. Jefferys*, [1908] A. C. 411. And the question, in such case, to be determined is exactly the same as if the testator had died before the passing of the Act, and had left next of kin: *Read v. Stedman*, 26 Beav. 495; *Dacre v. Patrickson*, 1 Dr. & Sm. 182.

(*e*) See *Saltmarsh v. Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*f*) See *supra*, note (*d*).

(*g*) *Pratt v. Sladden*, 14 Ves. 198; *Dawson v. Clark*, 18 Ves. 254; *Vezey v. Jamson*, 1 Sim. & Stu. 69.

(*h*) *Graydon v. Hicks*, 2 Atk. 18; *Pratt v. Sladden*, 14 Ves. 198.

(*i*) *Dawson v. Clark*, 15 Ves. 414, by Sir W. Grant; 18 Ves. 254, by Lord Eldon; *Vezey v. Jamson*, 1 Sim. & Stu. 69; *Taylor v. Haygarth*, 14 Sim. 8, 12.

(*k*) *Robinson v. Taylor*, 2 Bro. C. C. 589; *Dawson v. Clark*, 18 Ves. 257, *per* Lord Eldon; *Ellcock v. Mapp*, 3 H. L. C. 492; 2 Phil. Ch. C. 793 (overruling the decree of the V.-C. in *Mapp v. Ellcock*, 15 Sim. 568, and the opinion of Sir W. Grant in *Dawson v. Clark*, 15 Ves. 409; 2 V. & B. 399); *Read v. Stedman*, 26 Beav. 495. So where the trust fails under the Mortmain Act: *Dacre v. Patrickson*, 1 Drew. 782; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Re West*, [1900] 1 Ch. 84.

the next of kin: But it may be otherwise, where he is made trustee of some particular fund, and not the whole residue (*l*).

The rule is the same where the character of trustee is plainly affixed to him, though not by express words: As where there is a direction to the executor to "keep a proper account" (*m*): or where the testator appoints him, entreating him to take the office (*n*), or directs that the executor shall be saved harmless from all expenses attending the execution of the Will (*o*); or declares that the whole of the property shall pass by the Will "according to law" (*p*); or appoints the executor "to see my Will put in force" (*q*).

character of
trustee plainly
affixed :

So a presumption against the executor may arise from the condition of the party appointed, as where the testator names a mercantile firm to be his executors (*r*); or the person who shall for the time being fill a certain office, as that of ambassador from a particular country (*s*).

If the character of trustee is affixed by the Will to one of several executors, they are all trustees; for there is no instance of making one a trustee, and the others not (*t*).

Again, it has been long settled that an express legacy, however small, to a sole executor, will raise the necessary presumption against him (*u*); notwithstanding legacies are also given to the next of kin (*x*); and so will a legacy which is given to him as one of a class, as a legacy to the children of A., of which the executor is one (*y*); and notwithstanding the legacy is

legacy given
to a sole
executor

(*l*) *Batteley v. Windle*, 2 Bro. C. C. 31; *Griffiths v. Hamilton*, 12 Ves. 298; *Pratt v. Sladden*, 14 Ves. 198; *Russell v. Clowes*, 2 Coll. 648.

(*m*) *Gladding v. Yapp*, 5 Madd. 56.

(*n*) *Lord North v. Purdon*, 2 Ves. Sen. 495; *Seley v. Wood*, 10 Ves. 71; *Langham v. Sanford*, 17 Ves. 451; *Giraud v. Hanbury*, 3 Meriv. 150.

(*o*) *Dean v. Dalton*, 2 Bro. C. C. 634; *Saltmarsh v. Barrett*, 29 Beav. 474; 3 De G. F. & J. 279.

(*p*) *Cranley v. Hale*, 14 Ves. 307.

(*q*) *Braddon v. Farrand*, 4 Russ. Chanc. Cas. 87; *Barrs v. Fewkes*, 2 H. & M. 60. The question in these cases is, whether such words merely import the motive of the gift, or whether they express the very object of the bequest, *ibid.* 66.

(*r*) *De Mazar v. Pybus*, 4 Ves. 644.

(*s*) *Urquhart v. King*, 7 Ves. 225; *Griffiths v. Hamilton*, 12 Ves. 309.

(*t*) *White v. Evans*, 4 Ves. 21; *Milnes v. Slater*, 8 Ves. 295; *Sadler v. Turner*, 8 Ves. 617.

(*u*) *Farrington v. Knightly*, 1 P. Wms. 545; *Southcot v. Watson*, 3 Atk. 226; *Cradock v. Owen*, 2 Sm. & G. 241. But not a legacy to his wife: *Fruer v. Bouquet*, 21 Beav. 33.

(*x*) *Andrew v. Clark*, 2 Ves. Sen. 162; *Kennedy v. Stainsby*, 1 Ves. 66, note.

(*y*) *Abbott v. Abbott*, 6 Ves. 343.

specific (z). Nor will it make any difference that the appointment to the office and the gift of the legacy are in different parts of the Will; though it may be questionable whether the presumption arises, when a legacy is given by the Will, and the executor appointed by a codicil (a).

The presumption, however, will not be raised against the executor by a particular legacy to him for life, *with remainder over* (b), or by an exceptive bequest to him out of a subject bequeathed to another (c). But a gift of a reversionary interest will have that effect (d), unless, perhaps, it be contingent (e).

Where a small legacy was given to a sole executor and the testatrix directed that the residue of her property should "be at the discretion of my executor and at his own disposal," the executor took the residue beneficially (f).

Again, the presumption will not arise, where the executor legatee is an infant (g).

Moreover, a legacy to *one of several* executors will not raise the presumption against him (h); unless it be given to him *for his care and trouble* (i): Nor will the presumption be otherwise raised by unequal legacies to all the executors (j). When once there is inequality there is no presumption of a contrary intention sufficient to displace the legal title of the executors. Accordingly, where a testator gave equal pecuniary legacies to his three executors and specific legacies to two of them and left no next of kin, the executors were held entitled for their own benefit and not as trustees for the Crown (k). But where *equal* legacies are given to them all, the presumption is as strong;

legacy given
to one of
several
executors;

(z) 2 Rep. Leg. 643, 3rd edit.; *Randall v. Bookey*, 2 Vern. 425; *Southcot v. Watson*, 3 Atk. 226; *Martin v. Rebow*, 1 Bro. C. C. 154.

(a) *Langham v. Sanford*, 2 Meriv. 21.

(b) *Granville v. Beaufort*, 1 P. Wms. 114. *Secus*, where there is no ulterior disposition: *Zouch v. Lambert*, 4 Bro. C. C. 326; or where the gift is of the *residue* for life: *Joslin v. Brewet*, Bunb. 112; *Dicks v. Lambert*, 4 Ves. 725.

(c) *Griffiths v. Rogers*, Prec. Chanc. 231; 2 Rep. Leg. 646, 3rd edit.

(d) *Seley v. Wood*, 10 Ves. 71; *Oldman v. Slater*, 3 Sim. 84.

(e) *Lynn v. Beaver*, 1 Turn. & Russ. 63.

(f) *Re Howell*, [1915] 1 Ch. 241; cf. *Re Booth*, 86 L. J. Ch. 270.

(g) *Williams v. Jones*, 10 Ves. 77.

(h) *Buffar v. Bradford*, 2 Atk. 222; *Griffiths v. Hamilton*, 12 Ves. 298.

(i) *White v. Evans*, 4 Ves. 21; *May v. Lewin*, 2 P. Wms. 159, *in notis*. See *Dawson v. Thorne*, 3 Russ. Chanc. Cas. 235, 239.

(j) *Blinkhorne v. Feast*, 2 Ves. Sen. 27, 29; *Bowker v. Hunter*, 1 Bro. C. C. 328; *Oliver v. Frewen*, 1 Bro. C. C. 590; *Griffiths v. Hamilton*, 12 Ves. 309; *Russell v. Clowes*, 2 Coll. 648.

(k) *Att.-Gen. v. Jefferys*, [1908] A. C. 411.

as in the case of a legacy to a sole executor (*l*). If a legacy be given to one of several executors *for his care and trouble*, it makes all the executors trustees (*m*).

Where the residuary bequest lapses, the executor is not entitled (*n*); nor where it is void (*o*). Nor where the design of the testator to dispose of the residue, although not carried into effect, is evident: As where he bequeaths the residue in such manner as he shall appoint, and never makes any appointment (*p*): or where he leaves a blank for the name of the residuary legatee (*q*): or where he professes to dispose of the residue, but does not (*r*): or where, by an unexecuted codicil, he refers to the Will as not having disposed of the residue, and sketches out a disposition of it, which he leaves imperfect (*s*). So the presumption will be raised against the executor where the testator partially obliterates the residuary clause, leaving nothing but the introductory words (*t*): or where he professes to dispose of *part* only of his personal estate (*u*).

It remains to consider briefly the subject of the admissibility of parol evidence with reference to this question. Such evidence is not admissible in the first instance, on behalf of the next of kin, to raise the presumption for the exclusion of the executor (*v*). But when such presumption is raised from the words of the Will, parol evidence is admissible, on behalf of the executor, for the purpose of rebutting such presumption (*x*);

(*l*) *Ommanney v. Butcher*, 1 Turn. & Russ. 260, 269. See also *Clennell v. Lewthwaite*, 2 Ves. 471, by Lord Alvanley; *Taylor v. Haygarth*, 14 Sim. 8, 12; *Saltmarsh v. Barrett*, 29 Beav. 474; 3 De Gex, F. & J. 279.

(*m*) See *supra*, note (*i*).

(*n*) *Bennet v. Batchelor*, 3 Bro. C. C. 28.

(*o*) *Att.-Gen. v. Tomkins*, Ambl. 216.

(*p*) *Davers v. Dewes*, 3 P. Wms. 40; *Mordaunt v. Hussey*, 4 Ves. 117; *Dawson v. Clark*, 15 Ves. 414, by Sir Wm. Grant.

(*q*) *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91; *North (Lord) v. Pardon*, 2 Ves. Sen. 495; *Dawson v. Clark*, 15 Ves. 414. Cf. *Re Bacon's Will*, 31 C. D. 460, *infra*, note (*x*).

(*r*) *Oldham v. Carleton*, 2 Cox, 399.

(*s*) *Nourse v. Finch*, 1 Ves. 344; *S. C.*, 2 Ves. 78. But merely leaving a blank between the end of the Will and the signature is not sufficient to exclude the executor: *White v. Williams*, 3 Ves. & B. 72.

(*t*) *Mence v. Mence*, 18 Ves. 348.

(*u*) *Urquhart v. King*, 7 Ves. 225.

(*v*) *White v. Williams*, 3 V. & B. 72; *Langham v. Sanford*, 2 Meriv. 17.

(*x*) *Clennell v. Lewthwaite*, 2 Ves. 474; *Langham v. Sanford*, 17 Ves. 442, 443; *Lynn v. Beaver*, 1 Turn. & R. 66; *Bishop of Cloyne v. Young*, 2 Ves. Sen. 95. It will be observed that parol evidence is not admissible in cases where it is conclusively apparent on the Will itself

ineffectual or
inchoate resi-
duary clauses:

when parol
evidence
admissible:

and such evidence may then be opposed by similar evidence on behalf of the next of kin (*y*).

If, however, the Will conveys upon the face of it an unequivocal indication of an intention to clothe the executor with a fiduciary character only, as where he is expressly appointed *in trust* (*z*); or a legacy is expressly given to him for his care and trouble (*a*), parol evidence is not admissible to support the claim; for that would be to allow parol evidence to contradict the Will (*b*).

In cases within the operation of the statute 1 Will. IV. c. 40 (*c*), parol evidence is, in all cases, inadmissible to show that the testator intended his executors to take beneficially; for the Act required that the intention should appear by the Will (*d*).

Sometimes where there is a gift of the residue to a trustee other than the executor, the gift fails because the trusts are insufficiently declared, in such a case the trustee can take no beneficial interest, neither can any one claim successfully as a *cestui que trust*, and the result is that the residue will have to be distributed as upon an intestacy under the Statute of Dis-

that the executor was meant to be a trustee only (*per* Lord Eldon in *Langham v. Sanford*, 2 Mer. 6, 17), as distinguished from the case where there is a mere presumption against the executor from the words of the Will, *e.g.*, the presumption arising from a particular legacy to the executor. The case of an imperfect Will manifesting an inchoate intention to appoint a residuary legatee seems to be on the border line; it may, or may not, be conclusive to show an intention that the executor was meant to be a trustee only: and in *Re Bacon's Will*, 31 C. D. 460, where a testatrix made her Will on a printed form, and after giving certain legacies gave all her estate real and personal unto — to and for — own use absolutely, and then appointed C. W. C. to pay all her debts, &c., and to be the executor of her Will, Kay, J., held that it was quite conceivable that the testatrix believed that the effect of the blanks would be to entitle the executor to the residue, and that the effect of the blanks under the circumstances was only to raise a presumption against the executor of a resulting trust for the next of kin, and that parol evidence was admissible to rebut that presumption. No allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor: *Lynn v. Beaver*, 1 Turn. & R. 66.

(*y*) *Bishop of Cloyne v. Young*, 2 Ves. Sen. 91, 95.

(*z*) *Gladding v. Yapp*, 5 Madd. 59.

(*a*) *Langham v. Sanford*, 17 Ves. 443; *Whitaker v. Tatham*, 7 Bing. 628. But see *Williams v. Jones*, 10 Ves. 77, as to one of several executors.

(*b*) *Langham v. Sanford*, 17 Ves. 443; *Hall v. Hill*, 1 Dr. & W. 115, *per* Sugden, C. of Ireland; *Barrs v. Fewkes*, 11 Jur. N. S. 669.

(*c*) *Ante*, p. 1216.

(*d*) *Love v. Gaze*, 8 Beav. 472. See also *Briggs v. Penny*, 3 De G. & Sm. 525.

Not admissible in cases within the statute 1 Will. IV. c. 40.

Trust for next of kin where trust expressed on face of Will insufficiently declared.

tributions. If it is expressed on the face of the Will that the legatee is a trustee, but the trusts are not thereby declared, no trust afterwards declared by a paper not executed as a Will can be binding: in such a case the legatee will be a trustee for those entitled under the Statute of Distributions (e).

There are cases where no trust appears on the face of the Will, but the testator has been induced to make the Will, or, having made it, has been induced not to revoke it by a promise on the part of the legatee to deal with the property in a specified manner: in these cases the Court treats the trust as binding on the conscience of the donee (f). The communication to the trustee of the object of the trust may be after the date of the Will (g), but it is essential, in order to make the trust binding, that it shall be communicated to the legatee in the testator's lifetime, and that he should accept that particular trust (h). Vice-Chancellor Hall, in his judgment in *Re Fleetwood* (i), refuses to accept *Att.-Gen. v. Dillon* (k) and *McCormick v. Grogan* (l), as establishing contrary to the authorities mentioned in his judgment, that where the trust is referred to on the face of the Will, the Court will not give effect to the intended trust, although there is conclusive evidence upon which the Court would have given effect to the intended trust had the Will been altogether silent as to the trust. The judgment of the Vice-Chancellor is difficult to reconcile with the cases cited in note p.

Trusts not appearing on face of Will, but communicated to and accepted by legatee, enforced as binding on his conscience.

, but whether or not the principle, which led Courts of Equity to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, applies to cases where the Will shows some trust was intended, as well as to those where this does not appear, it seems clear that in either case the trust must be definite, communicated to the legatee and accepted by him. The judgment in the case of *Riordan v. Banon* (m) assumes that a Court of Equity will enforce the trust in favour of the person for whose benefit the legatee accepted the trust, even though the legatee make no claim to take

(e) *Johnson v. Ball*, 5 De G. & Sm. 85; *Briggs v. Penny*, 3 Mac. & G. 546; *Singleton v. Tomlinson*, 3 A. C. 404; *Re Gardner*, [1920] 1 Ch. 501.

(f) *McCormick v. Grogan*, L. R. 4 H. L. 62. See ante, p. 304, note (l); *Re Stead*, [1900] 1 Ch. 237.

(g) *Moss v. Cooper*, 1 J. & H. 352; *Re Stead*, ubi supra.

(h) *Re Boyes*, 26 C. D. 531; *Re Pitt Rivers*, [1902] 1 Ch. 403.

(i) 15 C. D. 594.

(k) 13 Ir. Ch. Rep. 127.

(l) L. R. 4 H. L. 82.

(m) 10 Ir. Eq. Rep. 649.

the property beneficially; for although no doubt the fraud would be of a different kind, if the legatee could by means of it retain the benefit of the legacy for himself, yet it would also be a fraud, though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees.

Parol trusts
not enforced
in favour of
witness to
Will.

In *Re Fleetwood* (n), Vice-Chancellor Hall held that one of the witnesses to the Will being interested under the parol trust such interest failed, but if the trust was enforced not under the Will but to prevent the Wills Act being used for fraud, the decision would seem difficult to support.

If the residue
be undisposed
of, it must be
divided
amongst all
the next of
kin, notwith-
standing the
testator de-
clares by his
Will that one
of them shall
have none of
his property.

It may be mentioned, in conclusion of this subject, that where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it. Thus, where a testator, by his Will, cut off his widow and one of his daughters from any part of his property, and directed that they should not receive any benefit therefrom, *but he made no disposition of his property*; it was held that the widow and daughter were, nevertheless, entitled to their share in the undisposed of residue, under the Statute of Distributions (o).

(n) 15 C. D. 594; distinguished in *Re Hetley*, [1902] 2 Ch. 866, and not followed in *O'Brien v. Condon*, [1905] 1 Ir. R. 51.

(o) *Johnson v. Johnson*, 4 Beav. 318. But see *Bund v. Green*, 12 C. D. 819.

BOOK THE FOURTH.

DISTRIBUTION.

THE office of administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor: But as there is no Will (unless the administration be *cum testamento annexo*) to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses (*a*).

CHAPTER THE FIRST.

DISTRIBUTION UNDER THE STATUTE

22 & 23 CAR. II. C. 10.

AFTER the Ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner mentioned in the preceding part of this Treatise (*b*), to delegate such authority to the relations of the deceased, the Spiritual Court attempted to enforce a distribution, and took bonds of the administrator for that purpose: But such bonds were prohibited by the Temporal Courts, and declared to be void in point of law, on the ground, that by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no further (*c*). Thus the administrator was entitled, exclusively, to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses (*d*).

(*a*) Toller, 369.

(*b*) *Ante*, p. 314.

(*c*) *Edwards v. Freeman*, 2 P. Wms. 441, by Sir Joseph Jekyll; *Hughes v. Hughes*, 1 Lev. 233; *S. C.*, Carter, 125; 2 Black. Comm. 515; Toller, 370.

(*d*) *Carter v. Crawley*, Sir T. Raym. 500; *Edwards v. Freeman*, 2 P. Wms. 441; 2 Black. Comm. 515; Bac. Abr. Exors. (I.).

22 & 23 Car.
II. c. 10.
Statute of
Distributions :

Sect. 3.
Ordinaries to
have power to
call admini-
strators to ac-
count, and to
make distri-
bution, &c.

The hardships of this privilege upon those of kin to the intestate in equal degree with the administrator was the occasion of the passing of the Statute of Distributions, 22 & 23 Car. II. c. 10 (e). That statute, after empowering the Ordinary on the granting of administration, to take a bond of the administrator, with two or more sureties, conditioned as before mentioned in a preceding part of this Work (f), proceeds, in sect. 3, to enact as follows, "And also that the said Ordinaries and Judges respectively shall and may and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral, and just expenses of every sort first allowed and deducted), amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws; saving to every one, supposing him or themselves aggrieved, their right of appeal, as was always in such cases used."

It has already appeared (g), that by reason of the Court of Probate Act, 1857, s. 23, that Court (whose jurisdiction was substituted for that of the Ordinary and other Ecclesiastical Judges) could not entertain a suit for the distribution of residue. But the Court of Equity compelled the administrator to apply it according to the statute. And now, although the Probate Division probably has jurisdiction to entertain an administration action, yet it would probably refuse to do so, since by sects. 33, 34 of the Judicature Act, 1873, all causes and matters for the administration of the estates of deceased persons are assigned to the Chancery Division.

(e) *Petit v. Smith*, 1 P. Wms. 8, by Lord Holt. There are two objects of that statute: one that the residue shall be forthcoming, and another that it shall be duly divided: by Bayley, B., in *The Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 529. The expression "Statutes of Distribution" does not include the Intestates Act, 1890: *Re Morgan*, [1920] 1 Ch. 196.

(f) *Ante*, p. 428 *et seq.*

(g) *Ante*, p. 203.

By sect. 4 of the Statute of Distributions, it is provided, Sect. 4.
Customs of
London and
York saved. "That this Act or anything herein contained shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them, but that the same customs may be observed as formerly: anything herein contained to the contrary notwithstanding." This section was repealed by 19 & 20 Vict. c. 94, which provides that the special customs concerning the distribution of the personal estate of intestates observed in the city of London, and in the province of York and certain other places, shall, with reference to all persons dying on or after the 1st day of January, 1857, wholly cease and determine (*h*).

By sect. 5 of the Statute of Distributions, it is further enacted, "That all Ordinaries, and every other person (*i*), who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share, which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribu- Sect. 5.
How and to
whom the sur-
plusage is to
be distri-
buted:

Advancement
by portion :

Heir-at-law
to have an
equal part.

(*h*) See *post*, p. 1268.

(*i*) The word "person" here evidently means judge. See *Archbishop of Canterbury v. Tappen*, 8 B. & C. 158, by Lord Tenterden.

tion with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate" (j).

Sect. 6.
If no children.

And by sect. 6, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them" (k).

Sect. 7.
If no wife or
if no wife or
child.

And by sect. 7, it is provided, "That there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Sect. 8.
No distribu-
tion till after
a year:
If debts after-
wards appear,
then all to re-
fund propor-
tionably.

And by sect. 8, it is likewise enacted, "To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said Courts, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for, and recovered or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the debt or debts so discovered after the distribution made as aforesaid."

Sect. 9.
Act not to
extend to ad-
ministration
*cum testamento
annexo.*

Finally, by sect. 9, it is enacted, "That in all cases where the Ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the Will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made."

(j) In the case of a partial intestacy of the beneficial interest in undisposed-of residue, the rule still is that advances need not be brought into hotchpot: *Re Roby*, [1908] 1 Ch. 71, except, perhaps, in cases where the Executors Act, 1830, applies: *Ibid.* at p. 80.

(k) As to the modification of this section made by the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, see *post*, p. 1231.

It is obvious how near a resemblance this Statute of Distributions bears to the ancient English Law *de rationabili parte bonorum*; which Sir Edward Coke, though he doubted the generality of its restraint on the power of bequeathing by Will, held to be universally binding, in point of conscience at least, on the administrator or executor, in case of either a total or partial intestacy (*l*). It also bears some resemblance to the Roman law of succession *ab intestato*, which, and because the Act was also penned by an eminent civilian (*m*), has occasioned a notion that the Parliament of England copied it from the Roman Prætor; though it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the Western parts of Europe (*n*).

Lord Hardwicke, in the case of *Stanley v. Stanley* (*o*), took occasion to observe, that this statute was very incorrectly penned.

Where a party, entitled to a distributive share of the personal estate of an intestate, makes an agreement relating to the distribution, under a supposition that the estate is of a certain value, and it turns out to be greater than was known at the time of the agreement, a Court of Equity will set it aside (*p*): for it is a general principle of equity, that agreements, relative to real or personal estate, if founded on mistake, will be for that reason set aside (*q*).

Agreement as to distributive share.

In the investigation of the rights of the several parties entitled under this statute, it is proposed to consider, First, The rights of a husband, with respect to the personal property of his deceased wife: Secondly, The rights of a widow, with respect

(*l*) 2 Inst. 32, 33; 2 Black. Com. 516.

(*m*) Sir Walter Walker. See *R. v. Raines*, 1 Lord Raym. 574, by Lord Holt.

(*n*) 2 Black. Com. 516.

(*o*) 1 Atk. 457.

(*p*) *Cocking v. Pratt*, 1 Ves. Sen. 400.

(*q*) See *Pooley v. Ray*, 1 P. Wms. 355; *Bingham v. Bingham*, 1 Ves. Sen. 126; *Leonard v. Leonard*, 2 Ball & Beat. 183; *Stewart v. Stewart*, 1 Rob. App. Cas. 431. But see also *Stone v. Godfrey*, 5 De G. M. & G. 76, 90, per Turner, L. J.

to the effects of her husband: Thirdly, The rights of the children, and lineal descendants of the deceased: Fourthly, The rights of the next of kin.

SECTION I.

Of the Rights of the Husband and his Representatives, with respect to the Personal Property of his intestate Wife.

Husband's
rights as
administrator
to his wife:

It has been shown, in a former part of this Treatise, that the husband is entitled to the grant of administration of his wife's effects; and consequently, before the Statute of Distributions, he was entitled, as all administrators were, to the exclusive enjoyment of the residue: Doubts, however, arose, whether the husband's right was not superseded by the force of that statute; and whether he was not thereby bound to distribute her personal estate among her next of kin: To obviate which, it is provided by the 29 Car. II. c. 3, s. 25 (the Statute of Frauds), that neither the Statute of Distributions nor anything therein contained "shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act" (r).

rights of the
husband's re-
presentatives,
if he dies
without
taking out
administra-
tion to her:

In case the wife dies intestate, and afterwards the husband dies, without having taken out administration to her, the Ecclesiastical Court, until a late period, considered itself bound by the statute 21 Hen. VIII. c. 5, to grant administration to the next of kin of the wife, and not to the representative of the husband (s). But such administrator was regarded, in equity, with respect to the residue, as a trustee for the representatives of the husband (t): For the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of his wife but himself; so that her whole property belonged to him (u). And the practice of the Prerogative Court of Canterbury, on this

(r) See *ante*, p. 640 *et seq.*, as to the extent of the husband's rights as his wife's administrator. See also *ante*, p. 528.

(s) See *ante*, p. 323.

(t) *Cart v. Rees*, 1 P. Wms. 381 (cited in *Squib v. Wyn*); *Humphrey v. Bullen*, 1 Atk. 458; *S. C.*, 11 Vin. Abr. 88; *Elliott v. Collier*, 3 Atk. 526; *S. C.*, 1 Ves. Sen. 15; 1 Wils. 168.

(u) *Elliott v. Collier*, 3 Atk. 527.

head, was altered in Sir John Nicholl's time; and the rule established was, that the administration shall be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (*v*).

So in a case where the husband takes out administration to his wife, and dies without having administered to all her estate, the Ecclesiastical Courts, for a long period, thought themselves obliged to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death (*x*); Still the beneficial interest in her effects has always been held to be in the representatives of her husband (*y*). or without
having fully
administered.

It may be a question, what shall constitute the legal relations of husband and wife, so as to confer the rights above discussed: This subject has already been considered, incidentally to the investigation of the husband's right to the administration (*z*).

SECTION II.

Of the Rights of a Widow, in the Distribution of the Effects of her intestate Husband, under the Statute.

The Statute of Distributions, it will be observed, provides, that if the intestate leaves children, as well as a widow, one-third shall go to the widow, and the residue among the children. If there be no children or lineal descendants of children subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred. But the Statute of Distributions has been materially modified in favour of the widow of an intestate dying without issue by the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, an Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestates' property. This Act provides: Sect. 1. "The real and personal estates of every man who shall die intestate (*a*) after the 1st of September, 1890, leaving a

Intestate's
estate not ex-
ceeding 500l.
to belong to
widow where
no issue.

(*v*) See *ante*, p. 323.

(*x*) *Ante*, p. 389.

(*y*) *Humphrey v. Bullen*, 1 Atk. 458.

(*z*) *Ante*, pp. 319, 325.

(*a*) The Act only applies to the case of a man dying wholly intestate; it does not, like the Statute of Distributions, apply to cases of partial intestacy: *Re Twigg's Estate*, [1892] 1 Ch. 579. But it applies where there is a complete failure by lapse of all beneficial interests under a Will: *Re Cuffe*, [1908] 2 Ch. 500; cf. *Re Morgan*, [1920] 1 Ch. 196. The value of the intestate's estate must be taken at his death: *Re Heath*, [1907] 2 Ch. 270.

widow but no issue (*b*) shall, in all cases where the net value of such real and personal estates shall not exceed 500*l.*, belong to his widow absolutely and exclusively.

Intestate's estate exceeding 500*l.*, widow to have a charge for 500*l.*

Sect. 2. "Where the net value of the real and personal estates, in the preceding section mentioned, shall exceed the sum of 500*l.*, the widow of such intestate shall be entitled to 500*l.*, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such 500*l.*, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

How charge to be borne as between realty and personalty.

Sect. 3. "As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.

Above provision to be in addition to share of residue.

Sect. 4. "The provision for the widow, intended to be made by this Act, shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of 500*l.*, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed (*c*).

How realty to be valued.

Sect. 5. "The net value of such real estates as aforesaid shall, for the purposes of this Act, be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate, as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the Statute 16 & 17 Vict. c. 51, and in the case of an estate for a life or lives according to the said tables and rules.

How personalty to be valued.

Sect. 6. "The net value of such personal estates as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral, and testamentary expenses (*d*) of the intestate,

(*b*) "Issue" would seem to include descendants of every degree.

(*c*) Dower out of real estate of an intestate is subject to abatement in respect of the widow's charge of 500*l.* imposed by this Act: *Re Charriere*, [1896] 1 Ch. 912.

(*d*) The phrase "testamentary expenses" is a slip of draftsman-ship, and means the expenses of obtaining letters of administration and of administration generally: *Re Twigg's Estate*, [1892] 1 Ch. 579, 582, *per* Chitty, J.

and all other lawful liabilities and charges to which the said personal estate shall be subject."

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of the personal estate; but, subject to her rights under the Intestates' Estates Act, 1890, one moiety belongs to her, and the other to the Crown (e).

The widow's title, however, under the Statute of Distributions, may be barred by a settlement before marriage (f), excluding her from her distributive share of her husband's personal estate; and even in the case of a female infant, she may be barred of her right by such a settlement, made before marriage, with the approbation of her parents or guardians (g).

Widow's
claim may be
barred by
settlement.

Where the settlement is expressed to be "as and for her jointure, in full lieu, bar and satisfaction of any dower or thirds which she could or might claim *at common law* out of all or any of the estates, real, *personal*, or freehold, of her intended husband," the widow will be excluded from her share under the statute; for the words "common law" must be construed as equivalent to the terms "according to the general law" (h).

In such cases, whether the husband die intestate, or dispose of his personal estate by Will, which disposition fails by lapse, the wife will be equally excluded from her distributive share.

(e) *Cave v. Roberts*, 8 Sim. 214; *In the goods of Bryant*, [1896] P. 159, where a widow died without taking administration to her husband's estate (which was of the net value of under 500*l.*, and, as he died without issue, belonged exclusively to her under sect. 1 of the Act of 1890), the Court granted administration to her executor under sect. 73 of the Court of Probate Act, 1857, notwithstanding the possibility of the intestate husband's estate proving afterwards to be of more value than 500*l.*

(f) See *Slatter v. Slatter*, 1 Younge & Coll. 28, as to the effect of a separation deed executed by the wife after marriage.

(g) *Lord Buckinghamshire v. Drury*, 3 Bro. P. C. 492; 4 Bro. C. O. 505, note; 2 Roper on Husb. & Wife, 26, 2nd edit. But see observations of Lord Herschell in *Seaton v. Seaton*, 13 A. C. at p. 67.

(h) *Gurly v. Gurly*, 8 Cl. & F. 743. See also *Druce v. Denison*, 6 Vos. 385. But where the husband, on his marriage, settles on the wife a rent-charge for her jointure, and in lieu of dower and thirds at common law, she is not thereby precluded from her distributive share in his undisposed-of personal estate; because the rent-charge must be regarded as intended to be in lieu only of any claim she might have on his lands: *Colleton v. Garth*, 6 Sim. 19. The word "thirds," however, is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether real or personal, of her deceased husband; and in construing the instrument the Court considers, *inter alia*, the fund out of which the provision for the wife was made: *Thompson v. Watts*, 2 Johns. & H. 291.

Provision by Will for widow, in lieu of her thirds, does not bar her claim under a *quasi* intestacy.

But it is otherwise when the husband *by Will* makes a provision for his wife, stating it to be in lieu and in bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the Will, the widow is entitled to a share under the statute (*i*): The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's Will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, viz., for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue (*k*).

In what case a widow cannot claim both her distributive share and money due under a covenant for her provision:

It is necessary to consider the right of the widow under the Statute of Distributions, with relation to the existence of a covenant or agreement, on the part of the husband, to settle or to leave, or that his executors shall pay, to his widow, a portion of his personal estate.

It is a general rule, that if the husband covenants to *leave*, or that his executor shall *pay*, to his widow a sum of money, or part of his personal estate, and he dies intestate, so that she becomes entitled to a portion of his personal property under the statute, such distributive share shall be a performance of the covenant, and she cannot claim both (*l*). The principle seems to be, that the husband, looking forward to the event of his death, when

(*i*) *Pickering v. Stamford*, 3 Ves. 332; *Garthshore v. Chalie*, 10 Ves. 17, 18; 2 Rop. Husb. & Wife, 23, 2nd edit. Cf. *Naismith v. Boyes*, [1899] A. C. 495.

(*k*) 2 Rop. Husb. & Wife, 23, 2nd edit. Lord Alvanley found this principle recognized by Lord Cowper, in *Sympson v. Hornsby*, which he stated from the Registrar's Book: *Pickering v. Stamford*, 3 Ves. 335. But this principle cannot be applied to a case where, on the face of the Will there is an intestacy, with language excluding the widow in absolute and comprehensive terms from any further share: *Lett v. Randall*, 3 Sm. & G. 83.

(*l*) *Blandy v. Widmore*, 1 P. Wms. 324; *Lee v. Cox and D'Aranda*, 1 Ves. Sen. 1; *Garthshore v. Chalie*, 10 Ves. 1. It will make no difference that the money under the covenant is to be paid at a determinate period within the year after the testator's death, whereas in strictness the distributive share is not payable until the end of that year; for this difference shall not be permitted to repel the legal presumption: *ibid.* 13.

his wife will have an interest in his property by the provision of the law, declines for that reason to give her any interest in it in his lifetime, considering that his covenant will be as effectually performed by what the law provides for her, as if the provisions were made by himself (*m*).

If the widow's distributive share is *less* than the amount of her provision under her husband's covenant, such share will be regarded as a partial performance; so that if the money covenanted to be paid by the husband's executors be 1,000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part performance of the covenant; viz., to the extent of 500*l.* (*n*).

In the case of *Goldsmid v. Goldsmid* (*o*), Sir Thomas Plumer, M. R., decided, that if the widow takes a distributive share of her husband's personal estate, not under an actual but a *quasi* intestacy, such share will be a performance of his covenant that his executors shall pay to her a sum of money at his death, if she survived him: In that case the husband by marriage articles covenanted, that if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3,000*l.*: By his Will he gave all his property to his executors, in trust after payment of his debts, at the expiration of three years from his decease, to divide it in such ways, shares and proportions, as to them should appear right: On his death, during the life of his wife, the executors having died or renounced, the property became divisible according to the Statute of Distributions: And the widow's distributive share, exceeding 3,000*l.*, was held a performance of the covenant in the marriage articles (*p*).

If the husband's covenant be entire, and the provision therein expressed to be secured to the wife is such as the covenant in *part* might be held to be performed by the widow's distributive share under the statute, according to the preceding cases, and the remaining part could not be so considered, then, since the covenant is entire, the Court will not split it, and hold a perform-

in what cases
she may claim
both.

(*m*) *Garthshore v. Chalie*, 10 Ves. 1, 16.

(*n*) *Ibid.* 16.

(*o*) 1 Swanst. 211. See *Re Hall*, [1918] 1 Ch. 562.

(*p*) The authority of this decision is doubted in 2 Rop. Husb. & Wife, 50, 2nd edit.; but the editor of the 2nd edit. of Roper in note (*b*), p. 50, questions the soundness of his author's reasoning. The case is referred to with approval in *Bannatyne v. Ferguson*, [1896] 1 I. R. 161.

ance and a non-performance at the same time (*q*): Thus, if the husband covenanted with trustees that his heirs, executors, &c., should pay to them 6,000*l.*, within a certain period after his death, upon trust as to 1,500*l.*, part of the sum, for his widow *absolutely*, if she survived him; and as to the remaining sum of 4,500*l.*, to pay the interest of it to her during her life, or widowhood; since the last sum, not being given absolutely to the widow, cannot be considered satisfied by her distributive share, neither shall the 1,500*l.* be so regarded (*r*).

Again, if the covenant by the husband be so framed as to require the money to be settled during his life, so that there was a breach of it before his death, and a *debt* may be considered as incurred to the widow, in such case the rule above laid down does not apply. Thus, in *Oliver v. Brickland* (*s*), the husband covenanted to pay for the benefit of his wife a sum of money within two years after the marriage, and that if he died, his executors should pay it: After surviving the two years, he died intestate, and his widow's distributive share was larger than the sum covenanted to be settled upon her: But Sir Joseph Jekyll decided, that it should not be taken in satisfaction of such debt, but that the widow should have both.

SECTION III.

The Rights of the Children and their Representatives to Distribution under the Statute.

After the allotment of a third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as legally represent such children in case any of the said children be then dead" (*t*). In case there be no wife,

(*q*) 2 Rop. Husb. & Wife, 51, 2nd edit.

(*r*) *Couch v. Stratton*, 4 Ves. 391. On the authority of this case, a similar question was reluctantly decided accordingly, by Wigram, V.-C., in *Salisbury v. Salisbury*, 6 Hare, 526.

(*s*) Cited in *Lee v. Cox and D'Aranda*, 3 Atk. 420; 1 Ves. Sen. 1; *Lang v. Lang*, 8 Sim. 451.

(*t*) By the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47), s. 1, marriage between a man and his deceased wife's sister is a good civil contract, and the children are legitimate and entitled to share in the distribution of personal estate, except so far as such personal estate is protected by s. 2: see *Re Green*. [1911] 2 Ch. 275.

then, by sect. 7, all the estate is to be distributed to and amongst the children (*u*).

By the words "such as legally represent such children," their lineal representatives to the remotest degree are admitted (*v*). But the term must be understood of descendants, and not next of kin (*x*); as for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing, and the child the whole of the father's share; yet the widow, though not strictly one of the next of kin, is in the same sense as the child a legal representative of the personal estate of the father (*y*).

What is meant by the "legal representatives" of the children.

To attain a clear apprehension of the subject of this section, three sorts of cases may be supposed: First, where none of the intestate's children are dead; secondly, where the intestate's children are all dead, all of them having left children; thirdly, where some of the intestate's children are living and some dead, and such as are dead have each of them left children (*z*).

On the first hypothesis, that is to say, where none of the intestate's children are dead, it is sufficiently obvious, that after the wife has had the third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate; as in this case they all claim in their own right (*a*).

1. Where none of the intestate's children are dead:

A brother or sister of the half-blood shall be equally entitled to a share with one of the whole blood; inasmuch as they are both equally near of kin to the intestate (*b*).

half-blood:

A posthumous child has also the same rights; for a child *en ventre sa mère* at the time of the father's death, being a person *in rerum naturâ*, is, by the rules of the common and the civil law, to all intents and purposes a child, as much as if born

posthumous child:

(*u*) A child legitimate by the law of its father's domicil, but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England under the Statute of Distributions: *Re Goodman's Trusts*, 17 C. D. 266. Cf. also *Re Andros*, 24 O. D. 637.

(*v*) *Carter v. Crawley*, Sir T. Raymond, 500.

(*x*) *Bridge v. Abbott*, 3 Bro. C. C. 226, by Lord Alvanley; *Evans v. Charles*, 1 Anstr. 132, by Eyre, C. B.

(*y*) *Price v. Strange*, 6 Madd. 161, 162.

(*z*) Toller, 374.

(*a*) *Ibid.*

(*b*) *Smith v. Tracey*, 1 Mod. 209; Toller, 374; *Watts v. Crooke*, Show. P. C. 4th edit. 139.

in the father's lifetime (c), and consequently is entitled under the statute.

an only child. If the intestate leave only one child, such case is not to be considered as omitted by the statute: therefore, in case the intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child (d). And where the intestate leaves an only child and no widow, although literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate (e).

2. Where all the intestate's children are dead, all having left children. Secondly, where the intestate's children are all dead, all of them having left children. Notwithstanding what is stated by Toller and other authorities referred to in the 9th Edit. of this Work (f), it has been decided that such descendants take *per stirpes* and not *per capita* (g).

(c) *Wallis v. Hodson*, 2 Atk. 117; *Burnet v. Mann*, 1 Ves. Sen. 156; Toller, 374. See also *post*, p. 1249, note (d). A child *en ventre sa mère* is to be deemed living, even though by such construction no benefit passes directly to the child, but only to the mother or father. See *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497, where the dictum of Lord Eldon in *Theellusson v. Woodford*, 11 Ves. 112, 149, commenting on the case of *Gulliver v. Wickett*, 1 Wils. 105, was discussed and followed. The case of *Blasson v. Blasson*, 2 De G. J. & Sm. 665, turned on the words "born and living," which seem to show that the testator contrasted birth with life. But in his judgment at p. 670 Lord Westbury says that "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that is limited to cases where *de commodis ipsius partus queritur*." This principle was approved and applied in *Villar v. Gilbey*, [1907] A. C. 139, and see *Re Salaman*, [1908] 1 Ch. 4; but see *Re Wilmer's Trusts*, [1903] 2 Ch. 411.

(d) *Brown v. Farndell*, Carth. 52; Bac. Abr. tit. Exors. I. 5.

(e) *Davers v. Dewes*, 3 P. Wms. 49, note (D); *Palmer v. Gerrard*, Prec. Chan. 21.

(f) *Walsh v. Walsh*, 1 Eq. Ca. Abr. 249, pl. 7; *Bowers v. Littlewood*, 1 P. Wms. 595, by Lord Parker; *Davers v. Dewes*, 4 P. Wms. 50, by Lord King; Bac. Abr. Exors. I. 3; Toller, 374.

(g) *Lockyer v. Vade*, Barnardiston, Ch. 444 (Lord Hardwicke); *Re Ross's Trust*, L. R. 13 Eq. 286 (Wickens, V.-C.); *Re Natt*, 37 C. D. 517 (North, J.); *Valentine v. Fitzsimmons*, [1894] 1 I. R. 94 (Porter, M. R.). See also note of Mr. Joshua Williams in the 4th edit. of *Watkins on Descents*, p. 259, and Mr. Hargrave's *Jurisconsult Exercitationes*, Vol. I., p. 271, referred to in the judgment of North, J., in *Re Natt*, *ubi supra*. The question depends on the construction of the statute. The view of these learned judges necessitates the application of the 5th section of the statute to a case where the intestate leaves no living children, but only legal representatives of such children, and the reading of the word "child" in the 7th section as meaning "child living either in person or in its descendants." This view also seems to involve reading the word "and" in the 2nd paragraph of the 5th section, where it follows the words "amongst the children of such persons dying intestate," as meaning "or."

Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children. In this case, the children of the deceased children take *per stirpes*, that is to say, not in their own right, but by representation. Thus, for example, if a father have three children, John, Mary, and Henry, and John die, leaving four children, and Mary die, leaving two, and Henry alone survive the father; on the death of the father intestate, one-third shall be allotted to Henry, one-third to John's four children, and the remaining third to Mary's two children; for these grandchildren are entitled as representing their respective parents (*h*).

The end and intent of the statute was to make the provisions for all the children of the intestate equal, as near as could be estimated (*i*). Accordingly, the 5th section of the statute proceeds to provide, that no child of the intestate, except his heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him or her (*k*).

This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others: But it may not be amiss to observe, that with regard to goods and chattels, this was part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and with regard to the lands descending in coparcenary, that it has always been, and still is, the common law of England, under the name of *hotchpot* (*l*).

This provision applies only to the distribution of the estates

(*h*) Bac. Abr. tit. Exors. I. 3; Toller, 374.

(*i*) *Edwards v. Freeman*, 2 P. Wms. 439, 440, by Sir Joseph Jekyll.

(*k*) 2 Black. Com. 516.

(*l*) 2 Black. Com. 517; *post*, p. 1242, n. (*b*). "It seemeth," says Littleton (sect. 267), "that this word 'Hotchpot' is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together": 2 Black. Com. 190. See *Fox v. Fox*, L. R. 11 Eq. 142; *Hewitt v. Jardine*, L. R. 14 Eq. 58; *Limpus v. Arnold*, 15 Q. B. D. 300; *Re Gist*, [1906] 2 Ch. 280; *Re Barker*, [1918] 1 Ch. 128, as to the effect of a hotchpot clause in a Will.

3. Where some of the intestate's children are dead, having left children.

Advancement: Exclusion of such children as have any land by settlement or have been advanced by portion:

of intestate *fathers*: And therefore if a mother being a widow advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot: This was decided by Lord King, C., on the principle, that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the Act seems to include those alone within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only (*m*).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: How much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received: This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (*n*).

The provision of sect. 5 of the statute applies only to the case of actual intestacy; and where there is an executor, and consequently a complete Will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them (*o*). The provision, however, applies to an intestacy occasioned by a Will becoming wholly inoperative in consequence of the death of the sole executor and legatee in the lifetime of the testator, as well as to an intestacy occasioned by the non-existence of any Will (*p*).

(*m*) *Holt v. Frederick*, 2 P. Wms. 357; *Bennet v. Bennet*, 10 C. D. 474.

(*n*) By Lord Raymond, in *Edwards v. Freeman*, 2 P. Wms. 443.

(*o*) By Sir W. Grant in *Walton v. Walton*, 14 Ves. 324; *Edwards v. Freeman*, 2 P. Wms. 440, 446; *Stewart v. Stewart*, 15 C. D. 539, 543. Sir W. Grant adds to his statement as contained in the above text: "Therefore the child advanced by her father in his life could not be called on to bring her share into hotchpot." But it was pointed out by Jessel, M. R., in *Stewart v. Stewart*, 15 C. D. at p. 543, that the law is different from what it was supposed to be in Sir William Grant's time, which was that advancement did not apply to a share of residue. Whenever the executor is to be deemed trustee for children as persons entitled under the Statute of Distributions, in respect of any residue not expressly disposed of (see 1 Will IV. c. 40, *ante*, p. 1216), since the children take in the same shares and in the same way as they would have taken under the statute, there seems no good reason, in ascertaining the shares in which they take, to disregard the provisions of the statute as to taking into account advances: in *Re Ford*, [1902] 1 Ch. 218, 222 (affd. on appeal, [1902] 2 Ch. 605). In the case of a partial intestacy the rule still is that advances need not be brought into hotchpot: *Re Roby*, [1908] 1 Ch. 71; see *Re Deprez*, [1917] 1 Ch. 24.

(*p*) *Re Ford*, *ubi supra*.

If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living (*q*).

It seems to be now settled that advances are chargeable with interest at 4 per cent. from the testator's death (*r*).

A child advanced in part shall bring in his advancement only among the other children; for no benefit shall accrue from it to the widow (*s*).

It will be convenient to consider this subject further: 1. With respect to children who have any land by settlement of the intestate. 2. With respect to children who have been advanced by pecuniary portions.

The statute extends not only to land, freehold and copyhold, settled on a younger child by the father, but also to charges upon land for such child (*t*): So if a father settle a rent out of his lands on a younger child, this is within the statute (*u*): and so is a reversion settled on any child but the heir (*x*).

Land claimed by marriage settlement has been held an advancement within the statute: but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotchpot must be such as is made by an act in the intestate's lifetime, and not by Will (*z*).

In respect to Borough-English lands, which descend to the youngest son, it was once held that he should allow for them, on

(*q*) *Proud v. Turner*, 2 P. Wms. 560; but see *Re Gist*, [1906] 2 Ch. 280. In *Re Scott*, [1903] 1 Ch. 1, the same principle was held to apply to the case of a gift over by Will to grandchildren of the share of a child dying in the testator's lifetime, since the grandchildren could take only that which their parent would have taken.

(*r*) *Stewart v. Stewart*, 15 C. D. 539; *Re Davy*, [1908] 1 Ch. 61; *Re Cooke*, [1916] 1 Ch. 480; *Re Beech*, [1920] 1 Ch. 40. As to the rule for ascertaining the income of the residuary estate pending distribution where interest is to be paid on advances, see *Re Poyser*, [1908] 1 Ch. 828; *Re Cooke*, [1916] 1 Ch. 480; *Re Tod*, [1916] 1 Ch. 567.

(*s*) *Kircudbright v. Kircudbright*, 8 Ves. 51, 64. So too if a Will contains a hotchpot clause, *primâ facie* the widow cannot claim any benefit thereunder against the children: *Stewart v. Stewart*, 15 C. D. 539. See also *Meinertzen v. Walters*, L. R. 7 Ch. 670; *Re Heather*, [1906] 2 Ch. 230.

(*t*) By Sir Joseph Jekyll, *Edwards v. Freeman*, 2 P. Wms. 441.

(*u*) *Ibid.*

(*x*) *Ibid.* 442.

(*z*) By Sir J. Jekyll, *ibid.* 440; *Twisden v. Twisden*, 9 Ves. 425, 462, by Lord Eldon.

the ground that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places (*a*). But that decision has been overruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate; for although the exception in the statute extends only to the eldest son, yet no law exists to oblige the heir in Borough-English to bring in his lands: The statute contains no such requisition: It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime (*b*).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotchpot under the statute: though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son, and afterwards given him a sum of money to ameliorate it (*c*).

2. With regard to children who have been advanced by pecuniary portions. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise from the intestate, yet if he hath had any advancement from his father out of his personal estate, he shall abate for it in the same manner as the other children (*d*): And were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*e*). Co-heiresses shall also, it seems, bring in such advancement, not being land (*f*), as they may have respectively received from their father, before they shall be entitled to their distributive share; agreeably to the principle of the Act, and to the object of a just and impartial father to promote an equality among his children (*g*).

(*a*) By Sir J. Jekyll, M. R., in *Pratt v. Pratt*, 2 Stra. 935.

(*b*) By Lord Talbot in *Lutwyche v. Lutwyche*, Cas. temp. Talb. 279. As to whether a coparcener is bound to bring land into hotchpot, see *Dillon v. Coppin*, 4 M. & Cr. 647; and see *ante*, p. 1239.

(*c*) *Smith v. Smith*, 5 Ves. 721.

(*d*) *Pratt v. Pratt*, Fitzgib. 285; Com. Dig. Admon. (H.); 4 Burn, E. L. 397, 8th edit.; *Smith v. Smith*, 5 Ves. 721.

(*e*) *Pratt v. Pratt*, Fitzgib. 285; Com. Dig. Admon. (H.); *Kircudbright v. Kircudbright*, 8 Ves. 51.

(*f*) See *Dillon v. Coppin*, 4 M. & Cr. 647.

(*g*) 4 Burn, E. L. 397, 8th edit.; Toller, 378.

It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

what is considered an advancement out of the personal estate:

A provision made for a child by a settlement, whether voluntary, or for a good consideration, as that of marriage, is such an advancement (*h*).

It is not requisite, to constitute an advancement, that the provision should take place in the father's lifetime (*i*). If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement (*k*). So a portion secured to the child, although *in futuro*, is an advancement (*l*). Thus a portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age, and unmarried, at the time of the intestate's death (*m*).

A portion, which was at first contingent, shall clearly be considered an advancement, when the contingency has happened (*n*). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotchpot (*o*): or the Court may order, that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was settled (*p*): But the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (*q*).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotchpot (*r*).

(*h*) *Edwards v. Freeman*, 2 P. Wms. 440, 441; *Phiney v. Phiney*, 2 Vern. 638.

(*i*) *Edwards v. Freeman*, 2 P. Wms. 445.

(*k*) *Ibid.* 442; Swinb. Pt. 3, s. 18, pl. 25.

(*l*) *Ibid.* 445.

(*m*) *Edwards v. Freeman*, 2 P. Wms. 435.

(*n*) *Ibid.* 442.

(*o*) *Ibid.* 442, 449; Toller, 377.

(*p*) *Ibid.* 446; Toller, 378.

(*q*) *Edwards v. Freeman*, 2 P. Wms. 440, 445, 449; Toller, 378.

(*r*) *Weyland v. Weyland*, 2 Atk. 635. See *Dillon v. Coppin*, 4 M. & Cr. 647, 669.

With respect to the sort of benefit which shall constitute such advancement, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (*s*). And although the office be only at will, as a gentleman pensioner's place (*t*), or a commission in the army (*u*), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotchpot (*x*), or rather may be so, for an annuity is not an advancement if given by way of maintenance of an infant (*y*), viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (*z*).

In a case where a father lent the sum of 10,000*l.* to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand: It appeared, that it was in consequence of the urgent desire of the intestate that the son engaged in the business; and that finding it was a losing concern he became desirous of retiring from it, but that the father urged him to continue it; that at the earnest entreaty of the intestate, he, with much reluctance, continued the business, and sustained heavy losses in it: The father on his deathbed caused the promissory note to be burned, and died intestate: Sir John Leach, M. R., held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an advancement to the son (*a*). Any sum of con-

(*s*) *Hender v. Rose*, 3 P. Wms. 317, note to *Pusey v. Desbouverie*.

(*t*) *Norton v. Norton*, 3 P. Wms. 317, note.

(*u*) *Kircudbright v. Kircudbright*, 8 Ves. 63; *Boyd v. Boyd*, L. R. 4 Eq. 305; *Taylor v. Taylor*, L. R. 20 Eq. 155.

(*x*) Swinb. Pt. 3, s. 18, pl. 29.

(*y*) *Hatfield v. Minet*, 8 C. D. 136.

(*z*) *Kircudbright v. Kircudbright*, 8 Ves. 51.

(*a*) *Gilbert v. Wetherell*, 2 Sim. & Stu. 254. In the case of *Smith v. Conder*, 9 C. D. 170, where a testator, who died in 1874, by his Will in 1864 gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot, Hall, V.-C., held that a letter written by the testator to one of his sons in 1873, whereby he stated that if he would give the testator a promissory note for a sum mentioned less than the amount advanced to the son he would write off the balance, was inadmissible in evidence, inasmuch as it was not sought thereby to rebut a presumption, but to displace

siderable amount paid out of the common fund of a family to or for the benefit of a child is an advancement within the meaning of the Statute of Distributions. Thus a premium upon the occasion of a son being articulated to an attorney (*b*): a sum paid for the purchase of a commission in the army for a son (*c*): sums paid by a father to a son to enable him to pay his debts (*d*): the payment of the admission fee to one of the Inns of Court in the case of a son intended for the Bar (*e*): the price of the outfit of a son entering the army (*f*): the price of plant and machinery and other payments to start a child in business (*g*): have been held to be advancements.

On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement (*h*): nor shall money expended by the father for the maintenance of a child, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (*i*).

what shall not
constitute an
advancement.

an express declaration contained in a testamentary instrument by declarations not testamentary. But it is submitted that the letter, together with the promissory note, was evidence of satisfaction of the advance. The note was not, as in *Gilbert v. Wetherell*, given with the advance.

(*b*) *Boyd v. Boyd*, L. R. 4 Eq. 305.

(*c*) *Ibid.*; *Taylor v. Taylor*, L. R. 20 Eq. 155.

(*d*) *Boyd v. Boyd*, L. R. 4 Eq. 305; *Auster v. Powell*, 31 Beav. 583; 1 De G. J. & S. 99; *Re Blockley*, 29 C. D. 250. This, however, was held by Jessel, M. R., not to be an advancement: *Taylor v. Taylor*, *ubi supra*. In *Re Scott*, [1903] 1 Ch. 1, the Court of Appeal preferred the view taken by Jessel, M. R., in *Taylor v. Taylor*—that a sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance—to the view taken by Wood, V.-C., in *Boyd v. Boyd*, and by Pearson, J., in *Re Blockley*.

(*e*) *Taylor v. Taylor*, *ubi supra*.

(*f*) *Taylor v. Taylor*, *ubi supra*. But *quare*: *Boyd v. Boyd*, L. R. 4 Eq. 305.

(*g*) *Taylor v. Taylor*, *ubi supra*.

(*h*) 3 P. Wms. 317, note to *Pusey v. Desbouverie*; *Elliott v. Collier*, 1 Ves. Sen. 16; S. C., 3 Atk. 528. Nor, says Swinburne, money in his purse to spend among his equals, or buy him suits of apparel, or books, or armour for the service of his country: Swinb. Pt. 3, s. 18, pl. 30.

(*i*) Swinb. Pt. 3, s. 18, pl. 19; Bac. Abr. tit. Exors. (K.). See also *Taylor v. Taylor*, L. R. 20 Eq. 155, where Sir G. Jessel, M. R., was of opinion that nothing was an advancement unless given on marriage or to establish the child in life, and accordingly he there held that (1) payment of a fee to a special pleader in the case of a son intended for the Bar; (2) price of outfit and passage money of an officer and his wife on going out to India with his regiment; (3) pay-

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a premium for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought into hotchpot (*k*). In allusion to this distinction, it is conceived that Lord Hardwicke expressed himself in *Morris v. Burroughs* (*l*): "I should think," said his Lordship, "that if a father should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," *i.e.*, will be a satisfaction of the custom, or must be brought into hotchpot, as the case may happen to be.

A provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotchpot (*m*). Such a provision as shall be construed an advancement must result from a complete act of the intestate in his lifetime (*n*), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (*o*). Still less shall property given or bequeathed to the child by any other person be so denominated (*p*): and least of all shall a fortune of his own acquisition, however great (*q*).

SECTION IV.

The Rights of the Next of Kin of the Intestate under the Statute of Distributions.

The 6th section of the statute provides, that in case there be no children or legal representatives of them, in existence, a moiety of the intestate's estates shall be allotted to his widow, and the residue shall be distributed equally among his next of kin in

ment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses, were not advancements. See *ante*, p. 1245, note (*d*).

(*k*) 2 Rep. Husb. & Wife, 12.

(*l*) 1 Atk. 403.

(*m*) *Walton v. Walton*, 14 Ves. 324; and see *ante*, p. 1240.

(*n*) *Edwards v. Freeman*, 2 P. Wms. 440; Toller, 380.

(*o*) *Ante*, p. 1243; Toller, 380.

(*p*) Swinb. Pt. 3, s. 18, pl. 18; Bac. Abr. tit. Exors. (K.); Toller, 380.

(*q*) Swinb. Pt. 3, s. 18, pl. 18; Bac. Abr. tit. Exors. (K.).

equal degree, and their representatives (*r*); and by the 7th section, in case there be neither wife nor children, then all the estate shall be distributed among the next of kin, in equal degree; but the same section enacts, that there shall be no representations admitted among collaterals after brothers' and sisters' children.

The next of kin referred to by the statute are to be ascertained by the same rules of consanguinity, as those which determine who are entitled to letters of administration (*s*). These rules have been already considered in a former part of this Treatise (*t*); but it may be convenient to repeat in this place some of their results.

Who are the
next of kin:

When a child dies intestate, without wife or child, leaving a father, the latter is entitled as the next of kin, in the first degree, to the whole of the personal estate of the intestate, exclusive of all others (*u*).

right of the
father:

If a man dies intestate, without a child, but leaving a widow, and a father, then the personal estate shall go in moieties between the widow and father, subject to the widow's primary right under the Intestates' Estates Act, 1890 (*x*).

So with respect to the mother; before the statute of 1 Jac. II. c. 17, if a child died intestate, without a wife, child, or father, his mother was entitled, as his next of kin, in the first degree to his whole personal estate: But by 'that statute, sect. 7, it is enacted, "that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The principle of this provision is, that otherwise the mother might marry, and transfer all to another husband (*y*).

right of the
mother:
1 Jac. II.
c. 17:

the brothers
and sisters
shall share
with the
mother:

This statute as well as the Statute of Distributions, was described by Lord Hardwicke as very incorrectly penned (*z*); and several questions have arisen upon the construction of this

(*r*) But see the Intestates' Estates Act, 1890, *ante*, p. 1231.

(*s*) *Lloyd v. Tench*, 2 Ves. Sen. 214; 2 Black. Com. 515; Toller, 381; 4 Burn, E. L. 280, 8th edit.

(*t*) *Ante*, p. 319 *et seq.*

(*u*) *Blackborough v. Davis*, 1 P. Wms. 51; *ante*, p. 333.

(*x*) *Keilway v. Keilway*, Gilb. Eq. Cas. 190, *per curiam*. See the effect of the Intestates' Estates Act, *ante*, p. 1231.

(*y*) *Blackborough v. Davis*, 1 P. Wms. 49, by Lord Holt.

(*z*) *Stanley v. Stanley*, 1 Atk. 457.

they shall
share with the
mother,
although the
widow:

section of it. In *Keilway v. Keilway* (a), the intestate left no child, but a wife, a mother, three brothers and sisters, and two nieces, the children of a deceased brother: It was insisted, on the part of the mother, that the case was not within the statute of 1 Jac. II. c. 17, s. 7, because here the intestate left a wife; whereas the statute was only meant to operate where the mother, before the making of it, would have gone off with the whole personal estate, and it was urged, on her behalf, that the words of the statute "without wife *or* children," must be understood "without wife *and* children;" for it could not possibly be intended in the disjunctive, *i.e.*, that in *either* case the brothers and sisters should share with their mother, inasmuch as if, after the death of the father, the child should die *without wife*, but leaving *children*, they would clearly take the whole, to the exclusion of the intestate's brothers and sisters: But Lord Chancellor King decreed that the wife of the intestate should have one moiety, and his mother should come in for no more than her share of the other moiety with the intestate's brothers and sisters, and the two nieces, the representatives of the deceased brother: And his Lordship laid down, that the intention of the statute was, in prejudice of the mother, that in every case where, before the statute, she would have had the whole, the deceased child's brothers and sisters should come in equally with the mother as to the whole; and where, before the statute, the mother would have been entitled to the half, the deceased child's brothers and sisters should now come in for a share of that moiety.

though there
be no brother
of the intestate
living,
yet if there be
nephews, &c.,
they shall
share with
their grand-
mother:

In *Stanley v. Stanley* (b), the intestate left a wife, a mother, and several nephews and nieces, the children of a deceased brother: Besides raising the objections taken in the above case of *Keilway v. Keilway*, it was insisted, on the part of the mother, that the words of the statute of James are in the conjunctive, "every brother and sister *and* the representatives of them," and therefore that the statute cannot operate in a case where there is *no brother or sister* of the intestate living: But Lord Hardwicke, C., held the contrary; and after recognizing *Keilway v. Keilway*, as far as it applied, decreed, that the personal estate should be divided into four equal parts, two-fourth parts to be allotted to the widow, one-fourth part to the

(a) 2 P. Wms. 344; S. C., Gilb. Eq. Cas. 189; 2 Stra. 710; 2 Eq. Cas. Abr. 441, 442.

(b) 1 Atk. 455.

mother, and the remaining fourth to be equally divided among the nephews and nieces: And his Lordship said, that the word *and* in the statute, immediately preceding the words *the representatives*, must be construed in the disjunctive.

In the last case, a further objection was raised, that if it should be held that the nephews and nieces were entitled by representation, it might be carried to the fourth or fifth generation, which would create great confusion and fractions; for there was nothing to restrain it in this Act, as there was in the Statute of Distributions: But Lord Hardwicke said, that the proviso in the statute of James was to be incorporated into the statute of Charles, which expressly says that representation shall not be carried beyond brothers' and sisters' children; agreeably to the rule, that statutes made *in pari materiâ* shall be construed into one another.

the representatives of the brothers and sisters of the intestate shall not share with his mother, beyond the brothers' and sisters' children :

In *Jessopp v. Watson* (c), a widow, having an only daughter by her deceased husband, married a second husband, and had two sons by the latter marriage: Afterwards her daughter by the former marriage died intestate, without ever having married: And the question was, whether her mother was entitled exclusively to her daughter's personal estate, or whether the brothers of the half-blood, her children by the second marriage, were entitled to share with her: And Sir John Leach, M. R., held, that by force of the statute of James, the brothers were entitled to a share with their mother (d).

brothers and sisters of the half-blood shall share with their mother.

If the intestate left neither wife, nor child, nor father, and there be neither brother or sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (e).

In what case the mother shall take the whole.

It is clear that the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (f).

Of the mother-in-law.

(c) 1 M. & K. 665.

(d) The same point appears to have been determined by Lord Hardwicke in *Burnet v. Mann*, 1 Ves. Sen. 156, *ante*, p. 1238, n. (c); though it is inaccurately stated by Vesey, that the claim of the posthumous brother of the half-blood was there made, *under the Statute of Distributions*: but in *Jessopp v. Watson*, Mr. Seaton, who was of counsel in the cause, stated that he had examined the case of *Burnet v. Mann*, in the Registrar's Book, from which it appeared that the claim was made under the statute 1 Jac. II. c. 17, s. 7; and that the decision in that case was, consequently, an express decision in point. See also *Wallis v. Hodson*, Barnard. Chan. Cas. 272.

(e) *Jackson v. Prudhome*, MS. 11 Vin. Abr. 196, tit. Exors. (Z. 12).

(f) *Rutland v. Rutland*, 2 P. Wms. 216.

Right of
brothers and
sisters:
preferred to
grandfather,
&c.

If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters, and a grandfather or grandmother, then, since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally under the statute. But in the year 1686, in the case of *Lord Winchelsea v. Norcliffe* (g), Lord Chancellor Jeffreys decided that a grandmother should have no share with brothers and sisters of the intestate. And it was again decided, in 1708, by the Barons of the Exchequer in the case of *Poole v. Wishaw* (h), by the unanimous opinion of the Court, after hearing civilians, that a grandmother had no right to share in distribution with a brother. This decision was followed by a similar one, as to a grandmother, in the case of *Norbury v. Richards*, before Fortescue, M. R. (i). And the same point was afterwards determined by Lord Hardwicke, in *Evelyn v. Evelyn* (k), on the authority of the two preceding cases, as well as the prevailing usage since the Statute of Distributions: And his Lordship observed, that if it was *res integra*, he should think there was just ground to prefer the brother: That the words of the statute must be taken together, amongst the next of kin, "*pro suo cuique jure*," according to the laws in such cases; and that if, by settled determinations, an equality or preference had been given, it was confirmed by the statute: And by our law it had been established, previously to the statute, that between brother and brother there was only one degree (l): That, besides, it would be a great inconvenience to carry the portions of children to a grandfather, who must be supposed to have been provided for, and may very probably be in a dying condition, and not want it; and it would be contrary to the very nature of provisions among children, as every child may very properly be said to have a *spes accrescendi*.

(g) 2 Freem. 95.

(h) Cited *per curiam* in *Evelyn v. Evelyn*, 3 Atk. 763; and in *Thomas v. Ketteriche*, 1 Ves. Sen. 333.

(i) Cited in 3 Atk. 763.

(k) 3 Atk. 762.

(l) See *Collingwood v. Pace*, 1 Ventr. 424, by Hale, C. B.; *Blackborough v. Davis*, 1 P. Wms. 50; *Buissieres v. Albert*, 2 Cas. temp. Lee, 53, by Sir George Lee. It is enough in law to say, *frater et hæres* or *soror et hæres*: 1 Salk. 38. See stat. 3 & 4 Will. IV. c. 106, s. 5, by which it is enacted that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or a sister shall be traced through the parent.

Nevertheless, if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother, being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles, or aunts, who are only in the third degree (*m*).

Grandfather preferred to uncle :

Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts (*n*).

great-grandfather shall share with uncle :

Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties, as being in equal degree; for here dignity of blood is not material (*o*).

grandfather by mother's side.

Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled (*p*). Hence, where the intestate left two aunts, and a nephew and niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation; but that if their father had been living he would have been entitled to the whole (*q*).

Uncles and nephew.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute: Therefore, if the intestate had a son and daughter, and they both die, the former leaving a wife, and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate (*r*).

Relatives by marriage not entitled.

The 7th section of the Statute of Distributions provides that there shall be no representations admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters, who are remotely related to the intestate: for the intestate is the subject of the Act; it is his

Representation among collaterals.

(*m*) *Mentney v. Petty*, Prec. Chanc. 593; *Blackborough v. Davis*, 1 P. Wms. 41; *Woodroff v. Winkworth*, Prec. Chanc. 527.

(*n*) *Lloyd v. Tench*, 2 Ves. Sen. 215; *ante*, p. 333.

(*o*) *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

(*p*) *Buissieres v. Albert*, 2 Cas. temp. Lee, 51.

(*q*) *Durant v. Prestwood*, 1 Atk. 454; *Lloyd v. Tench*, 2 Ves. Sen. 213; *Buissieres v. Albert*, 2 Cas. temp. Lee, 51.

(*r*) Toller, 386.

estate, his wife, his children, and for the same reason his brothers' and sisters' children; for he is equally correlative to all (s). Therefore, if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share (t). So if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution. Again, it has been held, that if the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribution with the son or daughter of the sister (u). Thus, although, as it has already appeared, lineal representatives *ad infinitum* shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it (x).

If the intestate's brothers and sisters were, at the time of his decease, all dead, and having left children, such children shall all take *per capita* (y). Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother (z). But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take *per stirpes*, by way of representation (a). Therefore, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other (b).

(s) *Carter v. Crawley*, Sir T. Raym. 496; *Caldicot v. Smith*, 2 Show. 286.

(t) *Beeton v. Darkin*, 2 Vern. 168; *Bowers v. Littlewood*, 1 P. Wms. 195.

(u) *Pett v. Pett*, 1 Salk. 250.

(x) Toller, 384.

(y) *Walsh v. Walsh*, Prec. Chanc. 54.

(z) *Bowers v. Littlewood*, 1 P. Wms. 595; *Janson v. Bury*, Bunb. 157.

(a) *Lloyd v. Tench*, 2 Ves. Sen. 215; *Buissieres v. Albert*, 2 Cas. temp. Lee, 51.

(b) So, in the case of a *bequest*, it has been held that if a testator directs his executors to pay and divide the residue of his personal estate "unto and amongst my own next of kin under the Statute of Distributions," brothers and deceased brothers' children take *per stirpes*: *Lewis v. Morris*, 19 Beav. 34. See also *Mattison v. Tanfield*, 3 Beav. 131; *Martin v. Glover*, 1 Coll. 269; cf. *Re Richards*, [1910] 2 Ch. 74. So where there was a gift "to and amongst the next legal representatives of A. and B., share and share alike;" their next of

When
brothers' and
sisters'
children take
per capita.

If a bastard, or any other person having no kindred, die intestate without wife or child, his effects, subject to his debts,

An intestate
bastard: or
person with-
out kin.

kin, according to the statute, were held entitled *per stirpes*: *Booth v. Vicars*, 1 Coll. 6, ante, p. 902 (but see *Richardson v. Richardson*, 14 Sim. 526); *Smith v. Palmer*, 7 Hare, 225. And it has been thought that the same distinction, as to taking *per capita* or *per stirpes*, will prevail, when a bequest is made to "relations," or "family," without mentioning the proportions in which the fund is to be divided; in which case it has been said, the Statute of Distributions will regulate the manner as well as the number in which the legatees, *i.e.*, the next of kin, are to take: Jarm. on Wills, 6th ed. 1629; *Re Nightingale*, [1909] 1 Ch. 385. But such a mode of division will not be adopted, when a contrary intention of the testator is apparent, as where the bequest is to relations *to be equally divided* amongst them; for there the division shall be *per capita*, although the state of the family is such as would require a distribution *per stirpes* under the statute: *Thomas v. Hole*, Cas. temp. Talb. 251; *Heron v. Stokes*, 2 Dr. & W. 89. So if there be a bequest of a fund *to be equally divided* amongst the testator's next of kin, both maternal and paternal, it is divisible between the two classes *per capita* and not *per stirpes*: *Dugdale v. Dugdale*, 11 Beav. 402. Again, if there is a bequest to "A. and to the children of B., *to be equally divided*," they take *per capita*: *Dowling v. Smith*, 3 Beav. 541; *Butler v. Stratton*, 3 Bro. C. C. 367; *Re Harper*, [1914] 1 Ch. 70. See also *Baker v. Baker*, 6 Hare, 269; *Pattison v. Pattison*, 19 Beav. 638; *Tyndale v. Wilkinson*, 23 Beav. 74; *Armitage v. Williams*, 27 Beav. 346; *Re Davies' Will*, 29 Beav. 93; *Rook v. Att.-Gen.*, 31 Beav. 313; *Robinson v. Shepherd*, 32 Beav. 665; *Gibson v. Fisher*, L. R. 5 Eq. 51; *Payne v. Webb*, L. R. 19 Eq. 26. But these and similar words may be controlled by the context: *Brett v. Horton*, 4 Beav. 239; *Re Campbell's Trusts*, 31 C. D. 685; 33 C. D. 98; and cf. *Re Stone*, [1895] 2 Ch. 196. So where a fund is directed to be paid on a particular event, in such cases as the following, namely—where a fund is to be divided "between the families of my brother L. and my sister E."—where one-fourth of a residue is to be paid to the younger children of N., and one other fourth paid to or amongst the younger children of S.—where a legacy is to be paid between and amongst the children of P. and the children of R.—in these and similar instances, it has been held that the distribution is to be *per capita*, and not *per stirpes*: *Abrey v. Newman*, 16 Beav. 433, by Romilly, M. R., citing *Barnes v. Patch*, 8 Ves. 604; *Lincoln v. Pelham*, 10 Ves. 166; *Rickabe v. Garwood*, 8 Beav. 579; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & Coll. 246. Again, if a bequest is made to "issue" as purchasers, or to "descendants," all those who answer the description will take *per capita*: *Davenport v. Hanbury*, 3 Ves. 257; *Leigh v. Norbury*, 13 Ves. 340; *Head v. Randall*, 2 Y. & Coll. C. C. 231; *Evans v. Jones*, 2 Coll. 216; ante, p. 878. But in this case also, they will take *per stirpes*, if the testator's intention to that effect appears from other expressions in the Will: *Rowland v. Gorsuch*, 2 Cox, 187. A distinction has been taken between a gift to several, with remainder to their children, and a gift to several, with a substitutionary gift to their children: Where there was a bequest of a fund to be equally divided between A. and wife and B. and wife for their lives, after which, to be equally divided between the children of A. and B., it was held, that the children all took *per capita*: *Abrey v. Newman*, 16 Beav. 431. See also *Swabey v. Goldie*, 1 C. D. 380. But where there was a bequest to A. for life, after which "equally amongst her sisters or their children living at her decease," it was held, that such of the children as were entitled

belong to the king, as *ultimus hæres* (c); not in a fiduciary character, but beneficially (d); who, with the exception of a small part, usually grants them by letters patent or otherwise: and then such grantee seems entitled as of course to the administration, and consequently to the sole enjoyment of the property (e).

SECTION V.

Distribution when the Intestate was domiciled abroad.

Hitherto it has been assumed that the intestate was, at the time of his death, domiciled in a place where the Statute of Distributions is the law of the land.

Distribution shall be according to the country of domicile:

The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time (f). It is

took *per stirpes*: *Congreve v. Palmer*, 16 Beav. 435. See also *Flinn v. Jenkins*, 1 Coll. 365; *Arrow v. Mellish*, 1 De G. & Sm. 355; *Shand v. Kidd*, 19 Beav. 310; *Begley v. Cook*, 3 Drew. 662. See also *Re Hutchinson's Trusts*, 21 C. D. 811, where the gift was in trust for "A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S., share and share alike, and after the decease of the said F. H. S. and R. S. to their children, share and share alike, and to their heirs for ever," in which case the fund was held divisible *per stirpes*, i.e., in moieties between the representatives of F. H. S. and the children of R. S. Even where the division is by the terms of the Will to be *per stirpes*, a question may arise how far back you are to go to discover the stocks which are intended by the testator. *Gibson v. Fisher*, L. R. 5 Eq. 51, seems to have decided that where a gift was *per stirpes*, the *stirpes* must be found at the earliest possible point. In so holding, Romilly, M. R., refused to follow the decision in *Robinson v. Shepherd*, 4 De G. J. & S. 129. But in *Re Wilson*, 24 C. D. 664, it was held, following *Robinson v. Shepherd*, that where a gift is to the descendants or issue "of A. and B. *per stirpes*, it seems that you must look to the number of families or *stirpes* descended from A. or B. and existing at the testator's death, and divide the fund primarily into a corresponding number of parts." This has been followed in *Re Alexander*, [1919] 1 Ch. 371.

(c) *Megit v. Johnson*, Dougl. 548, by Lord Mansfield; *Taylor v. Haygarth*, 14 Sim. 8; *Re Bond*, [1901] 1 Ch. 15. But if he leave a widow and no children, the Crown only gets one moiety; the other belongs to the widow: *Cave v. Roberts*, 8 Sim. 214. See *ante*, p. 344; and as to the effect of the Intestates' Estates Act, 1890, see *ante*, p. 1231.

(d) *Kane v. Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth; *Att.-Gen. v. Kohler*, 9 H. L. C. 654. See *ante*, p. 343.

(e) *Ante*, pp. 343, 344; Toller, 386; 2 Black. Com. 505, 506.

(f) *Enokin v. Wylie*, 10 H. L. C. 1, 13; *Dogioni v. Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 C. D. 600. However, "the law of the

not, however, correct to say, that with respect to the distribution of personal property, the law of England gives way to the law of a foreign country; but that it is part of the law of England, that personal property should be distributed according to the *jus domicilii* (g). If, therefore, a man die domiciled in this country, and administration be taken out to him here, debts due to him, or other of his personal effects, in Scotland or abroad, shall be distributed according to the law of England: for the *lex loci rei sitæ* is not to be recognized (h). On the other hand, if a man domiciled abroad die intestate, his whole personal property here is distributed according to the laws of the country where he was so domiciled (i). If it were otherwise, as it was observed by

country" must not always be understood to mean the general law as applicable to the subjects thereof, but in some instances the particular law applicable to the case of foreigners dying domiciled therein: *Collier v. Rivaz*, 2 Curt. 855, *ante*, p. 271; *Maltass v. Maltass*, 1 Robert. 67, 72, *ante*, p. 272. As to the conclusiveness of the judgments of the Courts of domicile in the Courts of a foreign country, see *ante*, pp. 273, 274; and *Pemberton v. Hughes*, [1899] 1 Ch. 781. As to the sense in which the English law adopts the law of the domicile, see *Lynch v. Government of Paraguay*, L. R. 2 P. & D. 268. The rule is, that the law adopts the law of the domicile as it stands at the time of the death, and it does not undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law: *ibid.* Where a British subject whose domicile of origin is Colonial acquires, according to English law, a domicile of choice in a country whose laws do not recognize domicile, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, and dies there, the English Court will distribute his movables according to the law of his domicile of origin: *Re Johnson, Roberts v. Att.-Gen.*, [1903] 1 Ch. 821.

(g) By Abbott, C. J., in *Doe v. Vardill*, 5 B. & C. 451, 452. The rule as to the law of domicile has never been extended to real property: *Doe v. Vardill*, 5 B. & C. 451; *S. C.*, in Dom. Proc. 2 Cl. & F. 571; *S. C.*, *nomine Birtwhistle v. Vardill*, 7 Cl. & F. 895. But the rule laid down in the above case, viz., that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit real property in England, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children": *Re Grey's Trusts*, [1892] 3 Ch. 88. As we have already seen (*ante*, p. 1237, note (u)), a child legitimated by the law of its father's domicile, but illegitimate according to English law, is entitled to a share as one of the next of kin in the personal estate of an intestate dying domiciled in England, under the Statute of Distributions: *Re Goodman's Trusts*, 17 C. D. 266 (reversing the decision of Jessel, M. R., 14 C. D. 619).

(h) *Thorne v. Watkins*, 2 Ves. Sen. 35; *Re Ewin*, 1 Crompt. & Jerv. 156, by Bayley, B.

(i) But it must be remembered, that as the validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicile (*Freke v. Lord Carbery*, L. R. 16 Eq. 461), so leaseholds in England belonging to a domiciled Scotchman were held to devolve, in the case of intestacy, upon the

Lord Hardwicke, in *Thorne v. Watkins* (*k*), it would destroy the credit of the public funds; for no foreigner would put into them, if because a title must be made up by administration or probate of the Probate Court of England, the property was to be distributed differently from the laws of his own country.

Hence it appears that a different doctrine prevails with respect to the distribution of the personal estate of a deceased, when in the hands of an executor or administrator, from that which is established with respect to the grant of probate or administration, by which he is empowered to possess himself of such estate: for, with regard to the latter, the *situs* of the property, as it has appeared in an earlier part of this Treatise, regulates the jurisdiction (*l*).

Although right to succession regulated by law of domicile of deceased, yet the administration of the estate must be in the country where possession of it is taken.

It must, however, be borne in mind, that (as there has already been occasion to point out (*m*)), although the right to succession is to be regulated according to the law of the country where the deceased was domiciled, yet the *administration of the estate* must be in the country in which possession of it is taken and held under lawful authority. In performing this duty the Court in which the estate is administered will be guided by the law of the domicile, and must ascertain for itself what the rights of the parties are under that law (*n*). Lord Westbury, in

person entitled according to the English Statute of Distributions: *Duncan v. Lawson*, 41 C. D. 394. See also *In the goods of Gentili*, Ir. Rep. 9 Eq. 541, in the judgment in which Warren, J., refers to *Freke v. Lord Carbery* as a distinct authority that the succession to chattels real depends upon the *lex loci*. See also *Re Moses*, [1908] 2 Ch. 235; *De Fogassieras v. Duport*, 11 L. R. Ir. 123; *Pepin v. Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24; *Leslie v. Bailie*, 2 Y. & Coll. Ch. C. 91. So mortgages of land, which are deemed to be immovables, are governed by the *lex loci rei sitæ*: *Re Hoyles*, [1911] 1 Ch. 179.

(*k*) 2 Ves. Sen. 37.

(*l*) See *per* Wood, V.-C., in *Campbell v. Beaufoy*, Johns. 326.

(*m*) *Ante*, p. 342.

(*n*) *Preston v. Lord Melville*, 8 Cl. & F. 1, *ante*, p. 342. See *per* Lord Cranworth in *Enohin v. Wylie*, 10 H. L. C. 19; *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 10 App. Cas. 453. See also *The Carron Iron Co. v. MacLaren*, 5 H. L. C. 456, *per* Lord St. Leonards. But it has been held (following the dicta of Lord Westbury in *Enohin v. Wylie*, *ubi supra*) that the legal personal representative constituted by the forum of domicile of a deceased person is entitled to receive the personal estate of the deceased got in through any letters of administration, wherever they may be, and the next of kin cannot make any claim against the estate except through the intervention of such legal personal representative: *Eames v. Hacon*, 16 C. D. 407; 18 C. D. 347. Where the Probate Division had granted a general probate of a Will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting

Enohin v. Wylie (o), says: "I hold it to be now put beyond all possibility of question that the administration of the personal estates of the deceased belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the Will of a testator or the parties entitled to the distribution of the estate of an intestate are required to resort." But, as Stirling, J., pointed out in his judgment in *Re Trufort* (p), this statement of the law by Lord Westbury has not, in its entirety, met with complete acceptance, and in particular, it has been more than once criticized by Lord Selborne, whose views are perhaps most fully stated in the case of *Ewing v. Orr-Ewing* (q), where he says: "So far as relates to domicile it has always appeared to me to be clear that the domicile of a deceased testator or intestate cannot in principle furnish any governing or necessary rule except for the purpose of determining the succession to movable estate. For that purpose recourse must be had not always or necessarily to the Courts, but always, and necessarily, to the law of the domicile. The succession being once ascertained, the rights resulting therefrom belong to, and follow, the person of the living successor, and not the dead predecessor. It has never been held that the forum in which such rights may be vindicated depends upon the domicile either of the plaintiff or defendant in any action or suit, and if the domicile of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected or those liabilities enforced can necessarily depend on the domicile of the deceased. . . . The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of domicile." Lord Cranworth, in *Dogliani v. Crispin* (r), says: "No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domi-

it to the English assets, and notwithstanding the opposition of a majority of the executors: *Stirling-Maxwell v. Cartwright*, 9 O. D. 173; 11 O. D. 522.

(o) 10 H. L. C. 1.

(p) 36 O. D. 600.

(q) 10 A. C. 453, 502.

(r) L. R. 1 H. L. 301, 314.

ciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicil. It is therefore often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of domicil is. Such evidence is, in general, far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from the conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the Courts of his domicil after long and careful consideration, and by their decision we are bound." Stirling, J., in his judgment in *Re Trufort*, after citing the above quoted passages from the judgments of Lord Westbury, Lord Selborne and Lord Cranworth, says, that the rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who, according to the law of the domicil, are entitled to the estate, yet where the title has been adjudicated upon by the Courts of the domicil such adjudication is binding upon and must be followed by the Courts of this country (*s*); even if the judgment of the foreign Court has by default of the party complaining of the judgment proceeded on a mistake as to the English law (*t*); or the whole of the facts were not before the foreign tribunal (*u*); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong recourse must be had to the mode of appeal provided in the foreign country (*x*).

(*s*) *Enohin v. Wylie*, 10 H. L. C. 1; *Ewing v. Orr-Ewing*, 10 App. Cas. 453; *Doglioni v. Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 O. D. 600; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

(*t*) *Castrique v. Imrie*, L. R. 4 H. L. 414; *Godard v. Gray*, L. R. 6 Q. B. 139.

(*u*) *De Cosse Brissac v. Rathbone*, 6 H. & N. 301.

(*x*) *Bank of Australasia v. Nias*, 16 Q. B. 717; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

It remains to ascertain, what shall constitute a domicile with respect to the proper application of the above rule (y).

Rules for
ascertaining
the domicile.

A man's domicile is, *primâ facie*, the place of his residence: but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs or transitory (z). On this subject, the following propositions may be stated as deducible from the adjudged cases:

1. Though a man may have two domicils for some purposes, he can have only one for the purpose of succession (a).

2. The original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile (b).

(y) On this subject generally, see the erudite and valuable Treatise on the Law of Domicil, by Dr. Robert Phillimore.

(z) *Bempde v. Johnstone*, 3 Ves. 201, 202, by Lord Loughborough. With respect to the effect of *time* in constituting a domicile, see the judgment of Sir Wm. Scott in *The Case of the Harmony*, 2 Rob. Adm. Rep. 324, and *The Case of the Ann*, 1 Dods. Adm. Rep. 221. See further, as to what shall constitute a domicile, *Stanley v. Bernes*, 3 Hagg. 373; *Moore v. Darell*, 4 Hagg. 346; *Re Bruce*, 2 Cr. & Jerv. 436; *Tidswell v. Bowyer*, 7 Sim. 64; *Maltass v. Maltass*, 1 Robert. 67; *Whicker v. Hume*, 13 Beav. 366; 7 H. L. C. 124; *Heath v. Samson*, 14 Beav. 441; *Anderson v. Laneville*, 9 Moo. P. C. 325; *Bremer v. Freeman*, 10 Moo. P. C. 306; S. C., Dea. & Sw. 192; *Att.-Gen. v. Kent*, 1 Hurl. & C. 12; *Att.-Gen. v. Rowe*, *ibid.* 31; *President of the United States v. Drummond*, 33 Beav. 449; *Att.-Gen. v. Fitzgerald*, 3 Drew. 610; *Douglas v. Douglas*, L. R. 12 Eq. 617; *Re Patience*, 29 C. D. 976. See also the definition of domicile stated by Lord Wensleydale, in *Whicker v. Hume*, 7 H. L. C. 164, viz., "Habitation [by a man] in a place with the intention of remaining there for ever, unless some circumstances should occur to alter his intention." It is always material in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up: *Platt v. Att.-Gen. of New South Wales*, 3 A. C. 336.

(a) *Somerville v. Somerville*, 5 Ves. 750, 786; *Forbes v. Forbes*, Kay, 341; *Crookenden v. Fuller*, 1 Sw. & Tr. 441. With respect to contemporary domicils, the following distinction is recognised by foreign jurists, and seems to have met with the concurrence of Lord Alvanley, in the above case of *Somerville v. Somerville*, 5 Ves. 750, 789, viz., that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicile there, and not at his country residence. See also *Forbes v. Forbes*, Kay, 341; *Aitchison v. Dixon*, L. R. 10 Eq. 589, 595. See also S. C. as to a domicile being gained by the permanent residence of a man's wife.

(b) *Somerville v. Somerville*, 5 Ves. 750, 787; *Re Bruce*, 2 Cr. &

By the expression *forum originis*, or domicile of origin, here used, is not meant the domicile of birth: for the mere accident of birth in any particular place cannot in any degree affect the domicile: If the son of an Englishman is born upon a journey in foreign parts, his domicile would follow that of his father. The domicile of origin is that arising from a man's birth and connexions (*c*).

It appears from the terms of the proposition under consideration, that such a domicile cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicile be acquired (*d*);

Jerv. 436, 445, *per* Bayley, B.; *De Bonneval v. De Bonneval*, 1 Curt. 856; *Att.-Gen. v. Dunn*, 6 Mees. & W. 511; *Dalhousie v. M'Douall*, 7 Cl. & F. 817; *Munro v. Munro*, *ibid.* 842; *Brown v. Smith*, 15 Beav. 444. A change of domicile must be a residence *sine animo revertendi*; a temporary residence for purposes of health, travel, or business, does not change the domicile. Also every presumption is to be made in favour of the original domicile. No change can occur without an actual residence in a new place. No new domicile can be obtained without a clear intention of abandoning the old: *Lauderdale Peerage Case*, 10 A. C. 692. Again, in *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 310, Lord Cairns says, "the law is clear beyond all doubt with regard to the domicile of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired." *Per* Lord Chelmsford, "it is for the parties who rely on a change of domicile to prove that such change took place": *ibid.* 319.

(*c*) *Somerville v. Somerville*, 5 Ves. 787; *Forbes v. Forbes*, Kay, 341.

(*d*) *De Bonneval v. De Bonneval*, 1 Curt. 857; *Att.-Gen. v. Dunn*, 6 M. & W. 511; *Bell v. Kennedy*, L. R. 1 Sc. App. 307. The acquisition of a domicile does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicile, and of abandoning the former: *De Bonneval v. De Bonneval*, Curt. 863, 864; *Stevenson v. Masson*, L. R. 17 Eq. 78; *King v. Foxwell*, 3 C. D. 518; *Re Patience*, 29 C. D. 976. Accordingly, in *Aikman v. Aikman*, 3 Macq. 877, Lord Wensleydale laid down that "every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, *with the intention of abandoning his domicile of origin*." Lord Wensleydale's statement of the law has been adopted by the highest authorities, and it appears to be now settled that in order to acquire a new domicile a man must intend "*quatenus in illo exuere patriam*": *Moorhouse v. Lord*, 10 H. L. C. 272; *S. C.*, *nom.* *Lord v. Colvin*, 4 Drew. 366. The expression "*exuere patriam*" is unfortunate, since the question of domicile is a question of residence and not of citizenship. *Haldane v. Eckford*, L. R. 8 Eq. 631, *per* James, V.-C. The presumption of law is against the intention to abandon the domicile of origin, and that although the length of residence in a foreign country *per se* according to time and circumstances raises a presumption of intention to abandon the domicile of origin and to acquire a new domicile, still such presumption may be rebutted by facts showing that there was no such intention. A change of domicile is not to be *inferred* from the fact of a lengthened residence in a foreign country. To constitute a change of domicile it must be

and apparently if a man be *in itinere* towards an intended domicile when death supervenes, it is a sufficient act for this purpose (e). In the recent case of *Winans v. Att.-Gen.* (f), it was laid down by the House of Lords that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost and that the domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.

3. The proposition last stated is equally true of an acquired as of an original domicile. The domicile of origin having been abandoned and a new domicile acquired, the new domicile may be abandoned and a third domicile acquired (g): But an acquired domicile cannot be lost by mere abandonment, but continues until the intention of another change of domicile is carried into execution (h). Again, the domicile of origin does not revive

animo et facto: *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285; *Re Capdevielle*, 2 H. & C. 985; *Att.-Gen. v. Blucher de Wahlstatt*, 3 H. & C. 374; *Jopp v. Wood*, 34 Beav. 88; affirmed by the Lords Justices, 34 L. J. (N. S.) Ch. 21; *Whicker v. Hume*, 7 H. L. C. 159, by Lord Cranworth. See also *Crookenden v. Fuller*, 1 Sw. & Tr. 441; *King v. Foxwell*, 3 C. D. 518; *Re De Almeda*, W. N. (1901) 142; W. N. (1902) 55. If the *animus* and *factum* are both satisfactorily proved, the permanent residence abroad will operate as a change of domicile, notwithstanding such residence was occasioned by mere preference of climate, or by the opinion that the habits of the country may be better suited to the health than those of the country which has been quitted: *Hoskins v. Matthews*, 8 De G. M. & G. 13; *Brunel v. Brunel*, L. R. 12 Eq. 298; *Haldane v. Eckford*, L. R. 8 Eq. 631; *Stevenson v. Masson*, L. R. 17 Eq. 78; *Urquhart v. Butterfield*, 37 C. D. 357. It should be observed that a man cannot retain his original domicile by a mere declaration of his intention to do so, if he so acts as to change it: *Re Steer*, 3 H. & N. 594; *Doucet v. Geoghegan*, 9 C. D. 441; *Att.-Gen. v. Winans*, [1904] A. C. 287. The intention required to effect a change of domicile (as distinguished from the acts embodying it) is an intention to settle in a new country as a permanent home, and this is sufficient without any intention to change the civil status, and, *semble*, even if an intention not to change the civil status be proved: *Douglas v. Douglas*, L. R. 12 Eq. 617. As to the value of conversations and declarations as evidence of a change of domicile, see *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 450; *Att.-Gen. v. Winans*, *ubi supra*. Change of domicile by evidence of intention, as affecting the status of husband and wife, was discussed in *Re Martin*, [1900] P. 211.

(e) *Munroe v. Douglas*, 5 Madd. 405; *Forbes v. Forbes*, Kay, 341; *In the goods of Bianchi*, 3 Sw. & Tr. 16; cf. *In the goods of Raffanel*, *ibid.* 49. But see Story's Conflict of Laws, Ch. xii. s. 481 a., p. 678, note (2), 8th edit.

(f) [1904] A. C. 287.

(g) *De Bonneval v. De Bonneval*, 1 Curt. 864.

(h) *Munroe v. Douglas*, 5 Madd. 379; *Stanley v. Bernes*, 3 Hagg. 373; *Craigie v. Lewin*, 3 Curt. 435; *Commissioners of Charitable Donations v. Devereux*, 13 Sim. 14; *Udny v. Udny*, L. R. 1 Sc. App.

until an acquired domicile has been abandoned *animo et facto* (i).

441; *Bradford v. Young*, 29 C. D. 617; *Re Marrett*, 36 C. D. 400; *Att.-Gen. v. Winans*, *ubi supra*. In *Udny v. Udny* many important doctrines were laid down by several members of the House, which it is deemed desirable should be introduced into this Work, and they will, therefore, be found below.

By Lord Westbury:—Every individual has, at his birth, become the subject of some particular country by the tie of national allegiance, which fixes his *political status*, and becomes subject to the Law of the Domicil which determines his civil status. To suppose that for a change of domicil there must be a change of national allegiance is to confound the political with the civil status, and to destroy the distinction between *patriam* and *domicilium*. [See also *Brunel v. Brunel*, L. R. 12 Eq. 298.]

By the Lord Chancellor (Lord Hatherley):—A man may change his domicil as often as he pleases but not his allegiance. *Exeure patriam* is beyond his power. [Dictum of Lord Kingsdown in *Moorhouse v. Lord*, qualified.]

Per Lord Westbury:—It is a settled principle that no man shall be without a domicil, and to secure this end the law attributes to every individual as soon as he is born, the domicil of the father, if the child is legitimate, or the domicil of the mother, if the child be illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law, not of the party. It may be extinguished by an act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal. But it cannot be destroyed by the will and act of the party.

Domicils of choice and origin distinguished.

Domicil of choice is the creation of the party. When a domicil is acquired, the domicil of origin is in abeyance; but it is not absolutely extinguished or obliterated. When a domicil of choice is abandoned, the domicil of origin revives—a special intention to revert to it being unnecessary. [*King v. Foxwell*, 3 C. D. 518.]

Per Lord Chelmsford:—Story says, that the moment a foreign domicil is abandoned, the native domicil is re-acquired. The word “re-acquired” is an inaccurate expression. The meaning is, that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin. If, after having acquired a domicil of origin, a man abandons it and travels in search of another domicil of choice, the domicil of origin comes instantly into action and continues until a second domicil of choice has been acquired.

Per Lord Westbury:—A natural-born Englishman may domicile himself in Holland, but if he breaks up his establishment there and quits Holland, declaring that he never will return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere.

Legitimation per subsequens matrimonium.

By the Lord Chancellor (Lord Hatherley):—The status of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the status of the putative father, not on that of the mother. According to English law, where at the time of the bastard's birth the father has his domicil in England, no subse-

As an example of what shall constitute an acquired domicile, it may be mentioned that a residence in India, for the purpose of following a profession there in the service of the East India Company, creates a new domicile (*k*).

4. A new domicile cannot be acquired by a party's own act during pupilage, nor until the party is *sui juris* (*l*). Accord-

quent change of domicile can render practicable the bastard's legitimation. [*Re Grove*, 40 C. D. 216; and see *ante*, p. 866, note (*z*).]

It may here further be observed, on the subject of Domicil, that if a man, at the time he attains his majority, is of unsound mind, or remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the lunatic son. It has been also held, that the mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country. But if one already domiciled and resident in such country accept an offer in the consular service of another country, he does not thereby destroy his domicile: *Sharpe v. Crispin*, L. R. 1 P. & D. 611; *Urquhart v. Butterfield*, 37 C. D. 357.

(*i*) *Craigie v. Lewin*, 3 Curt. 435: In that case a native Scotchman, having by employment in the East India Company's service, acquired a domicile in India, it was held that by his return to Scotland, *animo manendi*, his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called on so to do.

(*k*) *Munroe v. Douglas*, 5 Madd. 404; *Bruce v. Bruce*, 6 Bro. P. C. 566, Toml. Edit.; *Craigie v. Lewin*, 3 Curt. 435. This has been so held as to an officer in the Indian army, where the duties of his appointment necessarily require residence in India for an indefinite period, notwithstanding he has property in the country which was his domicile of origin: *Forbes v. Forbes*, Kay, 341. But it is otherwise as to an officer in the King's army: *Att.-Gen. v. Napier*, 6 Exch. 217. See also *Brown v. Smith*, 15 Beav. 444; *Hodgson v. Beauchesne*, 12 Moo. P. C. 285. And the rule that a British subject does not by entering into and remaining in the military service of the Crown abandon the domicile which he had when he entered into the service applies to an acquired domicile as well as to the domicile of origin: *Re Macreight*, 30 C. D. 165. See further as to the acquisition of an Anglo-Indian domicile, *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285; *Moorhouse v. Lord*, 10 H. L. C. 272; *Jopp v. Wood*, 34 L. J. Ch. 212; *Allardice v. Onslow*, 33 L. J. Ch. 434; *Ex parte Cunningham, re Mitchell*, 13 Q. B. D. 418. An Anglo-Indian is not, for all purposes, an English domicile: *Forbes v. Forbes*, Kay, 341. But British subjects resident in Chinese territory cannot acquire in China a domicile similar to that existing in India, and commonly known as Anglo-Indian: *Re Tootal's Trusts*, 23 C. D. 532; nor does permanent abode at Cairo under British protection attract to a man an Anglo-Egyptian domicile: *Abdul-Messih v. Farra*, 13 App. Cas. 431; but see *Casdagli v. Casdagli*, *ante*, p. 272, n. (*u*). A peer of the British parliament is not incapacitated from acquiring a domicile of choice in a foreign country by reason of his obligation to attend the House of Peers when required: *Hamilton v. Dallas*, 1 C. D. 257.

(*l*) *Somerville v. Somerville*, 5 Ves. 787, by Lord Alvanley; *Forbes v. Forbes*, Kay, 341.

ingly a married woman, though living apart from her husband, has no power to change her domicile (*m*).

5. By marriage, the domicile of the husband becomes that of the wife (*n*), and she retains it after the death of her husband (*o*).

6. After the death of the father, children remaining under the care of the mother follow the domicile which she may acquire, and do not retain that which their father had at his death until they are capable of gaining one by acts of their own (*p*).

The rule is, however, it appears, subject to the condition that the domicile shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession: And it would seem, by the opinion of an eminent

(*m*) *Re Daly's Settlement*, 25 Beav. 456. In the absence of a decree of judicial separation or a divorce, a wife cannot obtain a separate domicile from that of her husband unless possibly in the exceptional cases referred to by Lord Cranworth in *Dolphin v. Robins*, 7 H. L. C. at p. 418: *Re Mackenzie*, [1911] 1 Ch. 578.

(*n*) *Warrender v. Warrender*, 2 Cl. & Fin. 488; *Dalhousie v. M'Dowall*, 7 Cl. & Fin. 817; *Whitcomb v. Whitcomb*, 2 Curt. 351. See *The Count de Wall's case*, 6 Moo. P. C. 216. In *De Nicols v. Curlier*, [1900] A. C. 21, a Frenchman and Frenchwoman married in France without any contract, so that, according to French law, their rights *inter se* as to property were subject to the law of community of goods. They came to England and were permanently domiciled here. The husband became a naturalised British subject, amassed a large fortune, and died in England, leaving his wife surviving, and having made an English Will, by which he disposed of all his property: It was held that, as to moveable goods, the rights of the wife, under the French marriage law as to community of goods, were not affected by change of domicile, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France. The rule that the law of the matrimonial domicile applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law: *Re Fitzgerald*, [1904] 1 Ch. 573.

(*o*) See Phillimore on the Law of Domicil, Ch. VI. No. XLI. *et seq.*; *Gout v. Zimmerman*, 5 Not. of Cas. 440.

(*p*) *Pottinger v. Wightman*, 3 Mer. 67; *Johnstone v. Beattie*, 10 Cl. & F. 66, 138, *per* Lord Lyndhurst, C., and Lord Campbell. But it is only during the mother's widowhood that she can change the domicile of her infant. See Story's Conflict, s. 506, note (1). The change in domicile of the infant is not, however, to be regarded as the necessary consequence of a change in the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of her infant, which in the infant's interest she may abstain from exercising, even when she changes her own domicile: *Re Beaumont*, [1893] 3 Ch. 490. Whether a mere guardian, not being a parent, can change the domicile of his ward, in respect of the right of succession to his estate, is a disputed point. See Story's Conflict, s. 505 *et seq.*; Phillimore, Ch. VII.

foreign jurist (*q*), that such fraud will be presumed, if no reasonable motive can be assigned for the change.

It must be mentioned, before leaving this subject, that in the case of *Curling v. Thornton* (*r*), Sir John Nicholl expressed a doubt whether a British subject is entitled so far *exuere patriam*, as to select a foreign domicile in such complete derogation of his British, as to render his property in this country liable to distribution according to any foreign law. And in the subsequent case of *Stanley v. Bernes* (*s*), the same learned judge said, that there was no case in which the property of a British subject, dying intestate in a foreign country, had been held distributable according to the law of such foreign country. But this doubt must be considered as settled by the decision of the delegates in the latter case (*t*), and it is now fully established, with reference to the present subject, that a natural-born British subject may acquire a foreign domicile: and further, that the *animus revertendi*, and claim to be considered, and treatment as, a British subject will not suffice to preserve his original domicile (*u*).

A domicile in India, is, in legal effect, a domicile in the province of Canterbury; and the law of England is therefore to be applied to the distribution of the property of intestates there domiciled (*x*). At all events the laws of England and India are now the same as regards the validity of Wills; for shortly after the passing of the new Statute of Wills (1 Vict. c. 26), an Act was passed by the Legislature in India, assimilating the law of India in respect of Wills to that of England (*y*).

By stat. 24 & 25 Vict. c. 121, s. 1, where a convention (*z*) 24 & 25 Vict.
c. 121. has been entered into with a foreign state willing to adopt the provisions of the Act, an order in council may direct that

(*q*) Pothier, in the introductory chapter to his Treatise on the Custom of Orleans.

(*r*) 2 Ald. 17.

(*s*) 3 Hagg. 441.

(*t*) See *ante*, p. 270.

(*u*) 3 Hagg. 373; *Moore v. Darell*, 4 Hagg. 346.

(*x*) *Ante*, p. 1263, note (*k*), where the question of Anglo-Indian domicile is discussed.

(*y*) See *Craigie v. Lewin*, 3 Curt. 441.

(*z*) As no convention with any foreign state has as yet been entered into, this statute is at present inoperative.

no British subject resident in such state shall acquire a domicile there, unless he shall have been resident there for a year and shall have made a declaration of his intention to become domiciled there; and the subjects of the foreign state are to acquire a British domicile only after the same formalities have been gone through.

SECTION VI.

Of the Payment of the Residue.

The subject of the duties of an administrator, with respect to the payment of the residue of an intestate's estate, has been in a great measure anticipated by the discussion of the duties of an executor with regard to the payment of the residue under a testamentary disposition of it.

For example, there has already been occasion to consider the subject with respect to the right of retainer by the administrator, in part or full satisfaction of a debt due to the intestate from the party entitled in distribution (*a*): Again, the law with respect to the payment of a residue, where a party entitled to a distributive share is an infant (*b*); or a married woman (*c*), has been considered in a previous part of this Treatise, incidentally, to the subject of the payment of legacies.

If a person entitled to distribution die within the year, his executor, &c., may claim.

Although the 8th section of the statute enacts, that no distribution of an intestate's effects shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and shall go to his personal representative: for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors (*d*): The statute also is in the nature of a Will framed by the Legislature for all such persons as die without having made one for themselves; and, by consequence, the parties entitled in distribution resemble a residuary legatee; and it has been always held, that if such legatee dies before the amount of

(*a*) *Ante*, p. 1049 *et seq.*

(*b*) *Ante*, p. 1135 *et seq.*

(*c*) *Ante*, p. 1151 *et seq.*

(*d*) *Brown v. Farndell*, Carth. 51, 52; Bac. Abr. Exors. I. 4.

the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (e).

(e) Bac. Abr. Exors. I. 4; *Cooper v. Cooper*, L. R. 7 H. L. 53, where it was held that the rule of the Statute of Distributions, which requires the conversion of an intestate's estate into money, was introduced simply for the benefit of creditors and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of the creditors) is complete. A residuary legatee under a Will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a Will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a Will; and see *Blake v. Bayne*, [1908] A. C. 371. An administrator may, however, sell for the purpose of distribution even though there are no debts: *Re Norwood and Blake*, [1917] 1 Ir. R. 472.

CHAPTER THE SECOND.

DISTRIBUTION UNDER THE CUSTOMS OF LONDON AND
YORK, &C.

THE fourth section of the Statute of Distributions provides, that the Act shall not in any way prejudice the customs of the city of London, or the province of York, or other places, but that they should be observed as formerly.

Although, therefore, by subsequent statutes, mentioned in an earlier part of this Work, (a), the restraint on testamentary dispositions in those places has been removed, and the customs may be thereby controlled at the pleasure of a testator: yet if a man died intestate, before December 31st, 1856, the customs remained in the same force, with respect to the distribution of his personal estate, as if no statutes had ever passed.

19 & 20 Vict.
c. 94. Customs of
London and
York abolished, as to
the estates of
persons who
have died on
or after Jan. 1,
1857.

But by stat. 19 & 20 Vict. c. 94, the 4th section of the Statute of Distributions is repealed, save only with respect to the distribution of the personal estate of persons who may have died on or before December 31st, 1856, "and the special customs respecting the distribution of the personal estates of intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after January 1st, 1857, wholly cease and determine, and the distribution of the personal estates of all persons so dying shall take place as if such customs had never existed, and as if the rules for the distribution of the personal estates of intestates generally prevalent in the province of Canterbury had prevailed throughout England and Wales, any law or statute to the contrary notwithstanding." It has been deemed advisable

(a) *Ante*, p. 2.

to omit in the present Edition of this Work (as in the 9th and 10th Editions) any discussion in detail of distribution as it existed under the customs of London and York, &c., which were abolished by the above Act. As, however, these customs remain in force and affect the distribution of the estates of persons who have died before January 1st, 1857, the reader is referred to the earlier Editions of this Work, Pt. III. Bk. IV. Ch. 2, where the nature and incidents of the customs which have been abolished are investigated at length.

PART THE FOURTH.

THE LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR.



BOOK THE FIRST.

ASSETS.

HAVING investigated in a former part of this Work (*a*) the quantity of the estate which devolves to an executor or administrator, it remains, 1st, to consider what portion of that property is regarded in law as applicable by him to the satisfaction of the different claimants on the estate, as well upon valuable consideration as volunteers: and, 2ndly, to complete the examination already commenced in an earlier stage of this Treatise (*b*), of the order in which that application must be made, with reference to the priority subsisting among the claimants (*c*).

The property which will be the subject of these two inquiries, is called *assets* in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and a legatee or party in distribution, so far as such property extends.

This portion of the estate of the deceased is sometimes designated by the older writers by the term "*assets enter mains*," in contradistinction to "*assets per descent*," by which last expression is denoted that portion which descended to the heir, and which was sufficient to charge him, as far as it went, with specialty debts of his ancestor.

Important changes in the law on this subject have been effected by Part I. of the Land Transfer Act, 1897, which will be found set out fully with notes in the Appendix, although the several sections are dealt with in other parts of this work.

(*a*) *Ante*, p. 494 *et seq.*

(*b*) *Ante*, p. 762 *et seq.*

(*c*) This subject is of less importance than formerly by reason of the priority of specialty debts having been taken away by 32 & 33 Vict. c. 46.

CHAPTER THE FIRST.

PERSONAL ASSETS, LEGAL OR EQUITABLE.

THE general rule with respect to what shall be said to be assets in the hands of an executor or administrator to charge him is thus laid down in a book of authority (a): "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."

What shall be said to be assets in the hands of an executor :

There are many instances in which property in the hands of an executor is regarded as assets, although it was never in the testator: Thus if an executor renew a lease, he shall account for the new lease, as well as the old, as assets (b); and this even though the new lease to the executor may comprise additional property to that included in the testator's lease and at an increased rent (c). So if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets (d). So if A. promises, on good consideration, to deliver

assets which were never in the testator :

by contract :

(a) Touchst. 496.

(b) *Anon.*, 2 Ch. Cas. 208; *Bromfield v. Chichester*, 2 Dick. 480; *James v. Dean*, 11 Ves. 392; *Randall v. Russell*, 3 Meriv. 190. See also *Fitzroy v. Howard*, 3 Russ. C. C. 225; *Giddings v. Giddings*, *ibid.* 241; *Fosbrooke v. Balguy*, 1 M. & K. 226; and so if he purchases the reversion: *Bevan v. Webb*, [1905] 1 Ch. 620.

(c) *Re Morgan*, 18 C. D. 93.

(d) Wentw. Off. Ex. 188, 14th edit.; *Chapman v. Dalton*, Plowd. 286; Com. Dig. Assets, (C).

to B. by such a day certain wares or merchandises, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages, for not performing, would have been (e).

by remainder: Again, chattels which were never vested in the testator in possession, but accrued to the executor by remainder, will be assets in his hands: Thus, if a lease be made to one for life, remainder to his executor for years (f), such remainder will be assets in the hands of the executor, though it were never in the testator (g). So where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor (h). So a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible (i).

by increase: So goods which have accrued by increase since the testator's death are assets in the hands of the executor: Thus, if the sheep or other cattle of the testator bear lambs, &c., after the testator's death, these, although never the property of the testator, will be assets (k). So if the executor of a lessee for years enter into the tenements, the profits, over and above the rent, shall be assets (l). Therefore, if an executor has a lease for years of land of the value of 20*l.* a year, rendering rent of 10*l.* a year, it is assets in his hands only for 10*l.* over and above the rent (m). Again, if an executor employ the testator's goods in trade, the profits shall be assets (n): And whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased (o), or by direction of the testator, contained in his

(e) Wentw. Off. Ex. 188, 14th edit.; Com. Dig. Assets, (C).

(f) See *ante*, p. 536.

(g) Wentw. Off. Ex. 189, 14th edit.; Com. Dig. Assets, (C).

(h) *Ibid.*

(i) *Ibid.*

(k) Wentw. Off. Ex. 190, 14th edit.

(l) *Buckley v. Pirk*, 1 Salk. 79; Wentw. Off. Ex. 190, 191, 14th edit. But the profits, as far as the amount of the rent, are received by the executor as tertenant, and appropriated to the use of the lessor: 1 Salk. 79.

(m) *Body v. Hargrave*, Cro. Eliz. 712; Godolph. Pt. 2, c. 24, s. 1. A leasehold estate, though not sold, is assets *ad valorem*: *Jury v. Woodhouse*, Barnes, 333; *Vincent v. Sharpe*, 2 Stark. 507.

(n) Godolph. Pt. 2, c. 24, s. 4; Com. Dig. Assets, (C).

(o) Generally speaking, the death of a partner, of itself, dissolves

Will, or under the direction of the Court of Chancery, the profits of such trade shall be assets, for which he shall be accountable (*p*). Thus in *Gibblett v. Read* (*q*), Lord Hardwicke held, that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly. And his Lordship said, that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate (*r*); as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator (*s*).

the partnership: *Vulliamy v. Noble*, 3 Meriv. 614. And even where the partners have covenanted that they and their respective executors shall continue partners for a certain time yet unexpired, the executors of the late partner are entitled to a decree for a dissolution, subject to their liability to damages recoverable in an action by the surviving partners, for a breach of the covenant: *Downs v. Collins*, 6 Hare, 418. Sect. 33 (1) of the Partnership Act, 1890, provides that, subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death of any partner.

(*p*) As to the duty of the executor or administrator with regard to the business of the deceased, and as to the rights and liabilities of the executor or administrator carrying on the business of the deceased, see *post*, Pt. v. Bk. I. Ch. II.

(*q*) 9 Mod. 459.

(*r*) See also *Moseley v. Rendell*, L. R. 6 Q. B. 338; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(*s*) His Lordship further observed that if the house of the testator were a house of great trade, the executor must account for the value of what is called the goodwill of it. See also *Worral v. Hand*, Peake, N. P. C. 74, accord. So an assignment by deed of the goodwill of a trade has been held to be a conveyance of "property" within the Stamp Act: *Potter v. Commissioners of Inland Revenue*, 10 Exch. 147. But in *Spicer v. James*, Rolls, M. T. 1830, cited in Collyer on Partnership, p. 82, Sir J. Leach held that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration, and was not assets in the hands of the administrator. See, however, *contrâ*, *Smale v. Graves*, 3 De G. & Sm. 706, and *Hill v. Fearis*, [1905] 1 Ch. 466. With respect to the goodwill of a business, in which several are partners, it seems that, as to a partnership between professional persons, on the death of one the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership: *Farr v. Pearce*, 3 Madd. 78. But whether this survivorship of the goodwill exists in the case of commercial partnerships has been questioned. In *Hammond v. Douglas*, 5 Ves. 539. Lord Loughborough determined that the goodwill of a trade carried on in partnership without articles survives, and is not partnership stock. But in *Crawshay v. Collins*, 15 Ves. 227, Lord Eldon doubted the propriety of that decision, and it seems to be no longer law. See

So, in *Pitt v. Pitt* (*t*), the administratrix of a deceased rope-maker in the king's yard at Woolwich was cited in the Prerogative Court of Canterbury, to exhibit an Inventory and account: The deceased had four apprentices; and the question was, whether the administratrix was bound to insert in the Inventory the amount of the wages earned by them, in the yard of the deceased, since his death: And Sir G. Lee was clearly of opinion, that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and the learned judge accordingly decreed her to charge herself with the profits arising from the apprentices.

by condition: So chattels, real or personal, to which the executor becomes entitled, after the death of the testator, by force of a condition, will be assets: As where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets (*u*). The law is the same where the condition is, that the testator shall pay money or do any other act to avoid the grant: Accordingly, it has been decided, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid on their redemption (*x*). And it was held at

also *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Wedderburn v. Wedderburn*, 22 Beav. 84, 104; *Smith v. Everett*, 27 Beav. 446; *Scott v. Scott*, 89 L. T. 582. In Lindley on Partnership, 8th edit. p. 512, it is stated that the modern authorities are wholly opposed to the notion that the value of the goodwill, as such, belongs to the survivor; it does not: *Re David and Matthews*, [1899] 1 Ch. 378. It may happen that the survivor may obtain the benefit of the goodwill without paying for it; for he is at liberty (unless restrained by agreement) to carry on business on his own account; but he does not acquire it as something belonging to him exclusively and with which the executors of the deceased have nothing to do. If a partnership is dissolved and there is no agreement to the contrary, the goodwill must be sold for the benefit of all the partners, if any of them insist on such sale: *Hill v. Fearis*, [1905] 1 Ch. 466; *Re David and Matthews*, [1899] 1 Ch. 378.

(*t*) 2 Cas. temp. Lee, 508.

(*u*) Wentw. Off. Ex. 181, 14th edit.

(*x*) Wentw. Off. Ex. 182, 14th edit.; *Hawkins v. Lawse*, 1 Leon. 155; *Harecourt v. Wrenham*, or *Harwood v. Wrayman*, Moore, 858; 1 Roll. Rep. 56, pl. 32; 1 Brownl. 76; 1 Roll. Abr. 920, (G.) pl. 5; *Alexander v. Lady Gresham*, 1 Leon. 225. A testator being indebted to R., deposited with him a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R.;

N. P. by Abbot, C. J. (*y*), that a lease which belonged to an intestate, upon which the plaintiff had a lien, on account of which he retained it in his hands, was nevertheless to be considered as assets in the hands of the administrator, who had the power to redeem it. But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (*z*).

"Assets in any part of the world," says the author of the *Touchstone* (*a*), "shall be said to be assets in every part of the world." So it was laid down by Lord Lyndhurst, in delivering the judgment of the Barons of the Exchequer in *The Attorney-General v. Dimond* (*b*), that "the effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets." Again, it was laid down by Bayley, B., in the case *Re Ewin* (*c*), that if the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator to sell the stock, and bring the proceeds into this country, in order to satisfy the creditors: and if he neglects to do so, he will be guilty of a *devastavit* (*d*). Accordingly, as

property of the testator shall be assets in whatever part of the world they are situate:

and died, leaving R. & M. his executors: R., still holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay unless R. & M. gave a receipt for it as executors: They did so, R. making protest that he signed as executor merely to satisfy the insurers: In an action by a judgment creditor, the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.): And the Court of King's Bench held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R.: *Glaholm v. Rowntree*, 6 Ad. & Ell. 710.

(*y*) *Vincent v. Sharpe*, 2 Stark. N. P. C. 507.

(*z*) Wentw. Off. Ex. 182, 14th edit.

(*a*) *Touchst.* p. 496.

(*b*) 1 Crompt. & Jerv. 370.

(*c*) *Ibid.* 151.

(*d*) So it has been laid down that a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor: *Bligh v. Lord Darnley*, 2 P. Wms. 622. And where there was a question as to the quality of an estate in land situate in a foreign country, the Court of Chancery referred it to a Master, to inquire whether the testator's interest in it was in its nature real or personal: *Gardiner v. Fell*, 1 Jac. & Walk. 24.

early as the reign of James I., in *Dowdale's Case* (e), where the jury found that assets within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea was surplusage; for that if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England: and it would be a great defect in the law, that those goods should not be liable to their debts.

But this doctrine has been questioned. In *Story's Conflict of Laws* (f), that eminent writer, in commenting on the resolution in *Dowdale's Case*, says, "This language, in its broad import, is certainly unmaintainable in our day; for it goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate which are locally situate abroad; although (as it has appeared in an earlier part of this Work) (g) he has not, in virtue of the domestic letters of administration, any authority to collect them, or to compel payment or delivery thereof to himself."

In *Dowdale's Case*, it will be observed, the foreign assets had actually come to the hands of the executor; so that the more general question, embraced by the terms of the resolution, did not, in truth, arise. But Mr. Justice Story doubts the authority of the case, even in the aspect which the actual facts of it present; observing that according to the doctrine maintained in England in modern times, the executor was not at all liable to be sued in England as executor under letters testamentary taken out in Ireland; and *à fortiori* not for assets received and administered in Ireland under that appointment: And that learned Commentator considers it as at least a doubtful question, whether if an executor or administrator, appointed in the country where the deceased died, should collect assets in a foreign country without obtaining a grant of administration there, the assets so received would constitute a part of the home assets which he would be bound to administer, and for which he would be liable to account under the domestic administration according to the domestic laws.

Administra-
tion granted

It has certainly been established (as there has already been

(e) 6 Co. 47 b.; *S. C.*, Cro. Jac. 55.

(f) Ch. XIII. sect. 514, a.

(g) See *ante*, pp. 267, 339.

occasion to show) (*h*), that although where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country of the domicile of the deceased, yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority: And that the administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to this country (*i*). The only mode, it seems, of reaching such assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled (*k*). Again, though the right of the home executor or administrator to an ancillary probate or grant of administration in a foreign country is usually admitted, by the comity of nations, as a matter of course (*l*), yet this new administration is made subservient to the rights of creditors and other claimants resident within the country where it is granted; and the *residuum* is transmissible to the country of the home administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found within its jurisdiction (*m*).

in different countries:
principal administration that granted by country of domicile:
estate must be administered in the country where possession is taken.

Relation of principal administration to that granted in foreign country.

(*h*) *Ante*, p. 340.

(*i*) *Ante*, pp. 341, 342, 1256; Story's Confli. Ch. XIII. sect. 518. See, however, *Sandilands v. Innes*, 3 Sim. 263. In that case it appeared, that Erskine Nimmo died intestate at Madras; and William Fairlie, a creditor of the deceased, took out letters of administration to him in the Supreme Court there: Fairlie afterwards came to England, and obtained letters from the Prerogative Court of Canterbury: Afterwards one of the intestate's next of kin procured the latter administration to be revoked, and letters to be granted to himself: He then filed a bill against Fairlie, praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by Fairlie: It was objected, that the bill being filed by the plaintiff in the character of personal representative only of the deceased, and not also as one of the next of kin, he was not entitled to sue for an account of the assets of the deceased possessed by Fairlie in India, but only of the assets possessed by him in this country: Sir L. Shadwell, V.-C., said, that if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, make it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India. See also *Hervey v. Fitzpatrick*, Kay, 421, *ante*, p. 343; *Maclaren v. Stainton*, 16 Beav. 279.

(*k*) Story's Confli. Ch. XIII. sect. 518; *ante*, p. 765.

(*l*) See *ante*, pp. 267, 339.

(*m*) *Eames v. Hacon*, 18 C. D. 347; Story's Confli. Ch. XIII. sect. 513; *ante*, p. 765.

Liability of
executor to
account for
assets out of
England.

The liability of an executor or administrator to account for assets out of England would seem to depend upon his relation to the foreign assets. It would seem from the decision in *Ewing v. Orr-Ewing* (n), that where the same person has vested in him English and foreign assets, then, whether the English administration be major or minor, principal or ancillary, the English Courts of Equity, if called upon so to do by a person entitled to claim in the administration, will, if the administrator be within the jurisdiction, judicially administer the whole of the assets vested in him. In a case where one has not only identity of trustees with the legal personal representatives here and abroad and unity of the trust which they have to perform, as was the case in *Ewing v. Orr-Ewing*, there is no difficulty, and the whole estate can be administered, as regards both English and foreign assets, in the English Courts; where, however, the only title of the English personal representative is under an English probate or letters of administration to the English assets, the administration, beyond that which is necessary for the payment of English creditors, may not conveniently be conducted by the English Courts, especially if the deceased is of foreign domicile and those entitled to the surplus of his estate after the payment of his debts are foreigners; in such a case the surplus of English assets after payment of all debts proved in England, might properly be ordered to be paid over to the administrator in the country of the deceased's domicile. Where, however, the deceased is of English domicile, the English Courts assume the power to make a general decree for administration of the whole estate of any testator or intestate who may have died leaving assets in several countries in respect of which several grants of probate or administration (whether principal or ancillary). might have been obtained, working out such a decree in the best way practicable as to assets not within the local jurisdiction. Lord Selborne in delivering his opinion in the House of Lords in *Ewing v. Orr-Ewing* (o), cited with approval the 589th section of Story on Equity Jurisprudence, Chap. IX.: "Courts of Equity of the country where the ancillary administration is granted (and other Courts, exercising a like jurisdiction in cases of administration), are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights.

(n) 9 A. C. 34.

(o) 10 A. C. at p. 514 (H. L. Sc.).

in the funds, whatever may be their domicile, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicile of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of their jurisdiction." But, as already stated, wherever there are two sets of personal representatives, one appointed by the tribunal of the country where the testator was domiciled, and another, and a different set of persons, appointed representatives in another country where there happens to be personal estate, questions will arise as to what are the rights of the executors in the country of the domicile as against the ancillary administrator, and when, and at what stage, the trustees and executors of the country of domicile require the ancillary administrator to hand over to them the assets collected under the ancillary administration (*p*). It would seem that wherever you have assets within the jurisdiction, and a person accountable for those assets also within the jurisdiction, a Court of Equity will, if called upon so to do, make a general decree for judicial administration, even though there may be assets abroad and the deceased be of foreign domicile, but that the English Courts in the course of the English action will not allow proceedings to be carried further than is convenient according to the comity of Courts, and would adopt the proceedings of the Courts of the country of the domicile of the deceased according to the necessities and exigencies of the case (*q*). The English Court could, of course, if there was pending a suit in the Courts of the country of the deceased's domicile, in which all questions, which could arise in the course of the administration, could be decided, stay the English action and prevent it going on here vexatiously and unnecessarily (*r*).

(*p*) See *per* Cotton, L. J., in *Re Orr-Ewing*, 22 O. D. 456, 467.

(*q*) *Stirling Maxwell v. Cartwright*, 11 O. D. 522.

(*r*) See *per* Cotton, L. J., in *Re Orr-Ewing*, 22 O. D. 456, 469.

Duty of personal representative of person with foreign domicile acting in this country under subsidiary grant of administration.

It has sometimes been asserted that the duty of the personal representative of a deceased of foreign domicile acting here under a subsidiary grant of administration is to pay the creditors and duties in the state under whose authority he is acting, and to remit the balance to the personal representative in the state or country of the domicile of the deceased, and an argument is sought to be based on this assertion that the Courts of a country other than that of the domicile of the deceased ought not judicially to administer assets not comprised in the subsidiary grant, even though the administrator or trustee of these goods happen himself to be within the jurisdiction of the Courts of the country from which the subsidiary grant issues and amenable to it. The case, however, of *Re Kloebe* (s), seems to shew that the assertion on which the argument is founded is itself without foundation, for it was decided in that case by Pearson, J., that in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors. In the case of *Re Boyse* (t), it was held by Malins, V.-C., that although judgment has been given for the administration of an estate, the Court has no power to restrain a foreign creditor from proceeding in a foreign Court against the administrator; but that if judgment were obtained in the foreign Court against the administrator by default, it would only be treated in the administration action as *primâ facie* evidence of the debt.

By whom assets may be recovered by process of law.

Generally nothing which is assets can be recovered by process of law except by the administrator acting under the authority issuing out of the Court whose process is sought to be enforced (u); but there are some apparent exceptions to that rule: one is where assets have come into the jurisdiction by being remitted to the agent of a foreign administrator: in such a case the foreign administrator may sue his agent without taking out letters of administration in the country to the forum of which he is resorting. Thus, in *Eames v. Hacon* (x), where an intestate died domiciled in Ireland, and letters of administration were granted in Ireland, and the Irish administratrix instructed her attorneys to procure letters of administration in India for her use and benefit, and they did so, and having received the

(s) 28 C. D. 175.

(t) 15 C. D. 591.

(u) *Fernandes' Executors' Case*, L. R. 5 Ch. 314.

(x) 18 C. D. 347.

Indian assets, and paid the Indian debts, and remitted the net proceeds to their agents in England, it was said by Jessel, M. R., and Baggallay, L. J., that the Irish administratrix would have been entitled to sue the agents in England even if she had not had the Irish letters of administration resealed. Again, in *Re Macnichol* (y), it was held that where judgment had been obtained in a foreign Court by the foreign administrator of a creditor against an English debtor who had since died and whose estate was being administered in England, the foreign administrator could prove without taking out English administration to his intestate.

If, however, the English Courts do undertake the judicial administration of assets of a deceased person of foreign domicile, they will administer such assets generally, as far as they can ascertain the law, according to the law of the deceased's domicile, the *lex domicilii*, but the priorities of creditors will be governed by the *lex fori*. Thus, in *Blackwood v. The Queen* (z), it was held by the Privy Council that although the law of the testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are for the purpose of legal representation, of collection and administration, as distinguished from distribution among the successors, governed by the law of their own locality, and not by that of the testator's domicile.

The general rule has long been established, that an executor or administrator shall not be charged with any goods as assets other than those *which come to his hands* (a). But considerable difficulty exists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator: It is said in *Wentworth's Office of an Executor* (b) that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor dwells at Coventry, viz., far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them; and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a

Law governing administration of assets of deceased person with foreign domicile.

What assets shall be considered as come to hand so as to charge the executor:

(y) L. R. 19 Eq. 81.

(z) 8 A. C. 82.

(a) *Read's Case*, 5 Co. 33, b, 34, a.

(b) P. 227, 14th edit.

coming of these goods to his hands as to charge him with payment of debts and legacies, and make his own goods liable instead of them. However, it was laid down by Lord Holt, in *Jenkins v. Plombe* (c), that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers (d).

Again, a question arises whether goods which come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, shall be considered assets in his hands: There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands (e), unless they were taken by the Queen's enemies (f). But it would seem that an executor or administrator stands in the condition of a gratuitous bailee, with respect to whom the law is, that he is not to be charged without some default in him (g). Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not be charged with these as assets (h).

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit: But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a

(c) 6 Mod. 181.

(d) See also Com. Dig. Assets (D).

(e) *Read's Case*, 5 Co. 34, a; *Bethenll v. Stanhope*, Owen, 132.

(f) Wentw. Off. Ex. 234, 14th edit.

(g) Wentw. Off. Ex. 235, 14th edit.; Com. Dig. Assets (D).

(h) *Jones v. Lewis*, 2 Ves. Sen. 240; *Job v. Job*, 6 C. D. 562; Wentw. Off. Ex. 236, 14th edit.; Com. Dig. Assets (D). A contrary rule was said to prevail at law prior to the Judicature Act. See *Crosse v. Smith*, 7 East, 258, 259. Now, however, the rule at law and in equity is the same (Judic. Act, 1873, sect. 25, sub-sect. 11), and an executor is not chargeable except in the case of wilful default: *Job v. Job*, *ubi supra*.

default in him (*i*). Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (*k*). So if the testator's sheep or other beast die, or if his ships perish by tempest, the executor shall not be charged with them as assets (*l*).

With respect to that part of the estate of an executor or administrator which consists of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money (*m*): So if the executor or administrator recovers any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator (*n*), or with himself in his representative character (*o*), all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted (*p*): but he shall not be charged with them until he has reduced them into possession (*q*): Thus in *Williams v. Innes* (*r*), in order to prove assets in the hands of the defendants, who were executors, an account rendered by them was given in evidence, in which they stated that 1,000*l.* has been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance: But Lord Ellenborough held, that this was not sufficient proof of assets, as it did not

Choses in
action how
far assets.

(*i*) *Jenkins v. Plombe*, 6 Mod. 181, 182; *Wightwick v. Lord*, 6 H. L. C. 234, 235, *per* Lord Wensleydale.

(*k*) *Jenkins v. Plombe*, 6 Mod. 181.

(*l*) Wentw. Off. Ex. 236, 14th edit.; Com. Dig. Assets (D); *post*, Pt. iv. Bk. II. Ch. II. § II.

(*m*) Com. Dig. Assets (D); Bac. Abr. Exors. (H) 2.

(*n*) Co. Litt. 144, a; 1 Roll. Abr. 920, Exors. (G), pl. 4, 5; Godolph. Pt. 2, c. 24, ss. 1, 2; Bac. Abr. Exors. (H) 2; Com. Dig. Assets (O).

(*o*) See *ante*, p. 658 *et seq.*

(*p*) Wentw. Off. Ex. 191, 14th edit. If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when received; but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets: *per* Parke, B., in *Smedley v. Philpot*, 3 M. & W. 586. The present practice is to obtain leave to issue execution under Ord. XLII. r. 23.

(*q*) Godolph. Pt. 2, c. 24, s. 5; *Jenkins v. Plombe*, 1 Salk. 207; 11 Vin. Abr. 239, 240. See also *Lowe v. Peskett*, 16 C. B. 500.

(*r*) 1 Campb. 364.

show that any part of the sum awarded had been received by the executors.

But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor: for the release, in contemplation of law, shall amount to a receipt (*s*). So if the executor take an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is a *quasi* payment (*t*).

And it has been laid down, that where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately: for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution (*u*).

This subject will be further discussed hereafter, when the nature of a *devastavit* by an executor or administrator is concerned (*x*).

Next avoidance of a church.

There may be personal property of the testator or intestate, to which his personal representative, as such, is entitled, which is not assets in his hands, by reason of not being vendible: For example, the patron of a church grants to the testator the next avoidance, and the church becomes void; and the testator dies before he presents: After his death his executor presents, and has the benefit of preferring his son or his friend: Yet this shall make no assets in his hands; because he could not lawfully take money to present (*y*). But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (*z*): And

(*s*) *Cocke v. Jenner*, Hob. 66; *Brightman v. Keighley*, Cro. Eliz. 43.

(*t*) *Norden v. Levit*, 2 Lev. 189; *Hosier v. Arundell*, 3 Bos. & Pull. 7; *Partridge v. Court*, 5 Price, 419—421; *Sparkes v. Restal*, 22 Beav. 587.

(*u*) *Jenkins v. Plombe*, 1 Salk. 207; *S. C.*, 6 Mod. 181.

(*x*) *Infra*, Pt. iv. Bk. II. Ch. II. § II.

(*y*) Wentw. Off. Ex. 173, 14th edit.; Godolph. Pt. 2, c. 24, s. 8. See also Lord Tenterden's judgment in *Rennell v. Bishop of Lincoln*, 7 B. & C. 195.

(*z*) Wentw. Off. Ex. 173, 14th edit.; Godolph. Pt. 2, c. 24, s. 8; *Sale v. Bishop of Lichfield*, Owen, 99; *Smallwood v. Bishop of Lichfield*, 1 Leon. 205.

if the testator had died before the church had become void, then, because the executor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity to make a sale (*a*).

A grant for years of an office is assets in the hands of the executor or administrator of the grantee (*b*). Office for years.

With regard to estates *pur autre vie* of any person dying before January 1st, 1838, the law applicable thereto will be found in the earlier Editions of this Work. Estates *pur autre vie*.
Before the Wills Act.

With regard to estates *pur autre vie* of any deceased person, who shall have died on or since January 1st, 1838, the statute 1 Vict. c. 26, after repealing the sections of the statutes of 29 Car. II. c. 3, and 14 Geo. II. c. 20, dealing with such estates, and enacting, by sect. 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by sect. 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate" (*c*). 1 Vict. c. 26,
s. 6.

(*a*) Wentw. Off. Ex. 173, 14th edit. See the Benefices Act, 1898 (61 & 62 Vict. c. 48), as to the amended law relating to restrictions on transfer of patronage rights.

(*b*) *Sir George Reynel's case*, 9 Co. 97, a; *Schellinger v. Blackerby*, 1 Ves. Sen. 347.

(*c*) This section applies to equitable estates in land, see *ante*, p. 525; *Reynolds v. Wright*, 2 De G. F. & J. 590; 25 Beav. 100; *Earl of Mountcashell v. More-Smyth*, [1896] A. C. 158; *Re Sheppard*, [1897] 2 Ch. 67; *ante*, p. 525, note (*c*).

The terms of the last conveyance of an estate *pur autre vie* and not the original grant must be looked to in order to ascertain whether it is to go to the heir as special occupant or to the legal personal representative (d). Where an equitable estate *pur autre vie* limited to a testator, his heirs and assigns, was devised to trustees, their heirs and assigns, for the use of A., it was held by Swinfen Eady, J., that, though the entire estate passed to A., his heir was not entitled to claim as special occupant, and that the estate passed to his administrator under the above section of the Wills Act (e).

An estate *pur autre vie* in real estate (ee) vested in any person dying on or before January 1st, 1838, now devolves by virtue of sect. 1 of the Land Transfer Act, 1897, to his personal representatives or representative, who, subject to the powers, rights, duties and liabilities mentioned in the Act shall, under sect. 2 (1), hold the real estate as trustees for the persons by law beneficially entitled thereto.

The effect of these statutes is not to convert estates *pur autre vie* in land into pure personalty or moveables. It is merely that such estates are in some cases to be applied in the same manner as personal estate. The result is that exemption from the duties imposed by the Legacy Duty Acts cannot be claimed in respect of such estates when they form part of the estate of a person having a foreign domicile on the ground that "*mobilia sequuntur personam*:" neither can exemption be claimed on the ground that such estates are real property and therefore not within the Legacy Duty Acts, for by sect. 6 of the Wills Act, 1837, it is provided that such estates shall be assets in the hands of the executor or administrator and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate; and by 36 Geo. III. c. 52, s. 20, estates *pur autre vie* applicable by law in the same manner as personal estate shall be charged with the duties thereby imposed as personal estate (f). Sect. 5 of the Land Transfer Act, 1897, provides that nothing in Part I. of the Act shall affect any duty payable in respect of real estate, or impose on real estate any other duty than is now payable in respect thereof.

(d) *Earl of Mountcashell v. More-Smyth*, [1896] A. C. 158, 165.

(e) *Re Inman*, [1903] 1 Ch. 241.

(ee) But see s. 1 (4), *ante*, p. 43.

(f) See *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192.

The absolute property of goods must have been vested in the testator, in order to make them assets in the hands of the executor (*g*). Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor (*h*).

Property in
testator as
trustee:

So, too, all property vested in the testator as sole trustee which devolves to and becomes vested in his executors will not of course be assets in their hands.

In the case of the death of a sole trustee after December 31st,

1882, sect. 30 of the Conveyancing Act, 1881, provides that:—

Conveyancing
Act, 1881,
s. 30.

“Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage, in any person solely, the same shall on his death notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and, accordingly, all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased’s personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers” (*i*).

Sect. 88 of the Copyhold Act, 1894 (re-enacting a similar section in the Act of 1887), provides that sect. 30 of the Conveyancing Act, 1881, shall not apply to land of copyhold or cus-

Copyhold Act,
1894, s. 88.

tomary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage. And sect. 1 (4) of the Land Transfer Act, 1897, excludes from the expression “real estate,” as used in the Act, land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor

(*g*) Bac. Abr. Exors. (H) 1. See *Parker v. Baylis*, 2 B. & P. 78.

(*h*) *Deering v. Torrington*, 1 Salk. 79. In *Byrn v. Godfrey*, 4 Ves. 6, it was held that a promissory note given to the testator was assets, notwithstanding his declaration to his executor that he never meant to call for payment of it.

(*i*) And see Conveyancing Act, 1911, s. 8, *ante*, p. 200.

is necessary to perfect the title of a purchaser from the customary tenant (*j*).

Sect. 10 of the Trustee Act, 1893 (replacing sect. 31 of the Conveyancing Act, 1881), does not enable a sole surviving trustee of a Will to appoint by his Will special executors for the purpose of executing in continuation to himself the trusts of the Will of the original testator (*k*).

Terms attendant on the inheritance of testator.

Prior to Dec. 31, 1845.

It is necessary in this place to advert to the nature of terms attendant on the inheritance (*l*). When a term for years before December 31st, 1845, was created for a particular purpose, as for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created was satisfied, the termor was considered in equity as a trustee for the owner of the inheritance; and though at law the term was deemed a term in gross in such trustee, yet in equity it followed the fee, and was looked upon as completely consolidated with it (*m*): Hence it was not regarded as personal assets in the hands of the executor of the person entitled to the fee, but as real assets which went to his heir (*n*). Yet this must not be understood of every term which attended the inheritance: for where a termor purchased the freehold and inheritance, and took a conveyance thereof in the name of a trustee, although the term in himself was attendant on his equitable fee simple, yet, at his death, it was assets in the hands of his personal representatives (*o*).

Fund for specific purposes not general assets.

It must be observed, that executors or administrators cannot be in a better condition, with respect to the estate of the deceased, than he himself would have been in; and therefore they cannot employ as general assets property which he would have been bound to apply to a particular purpose (*p*): Thus, in

(*j*) See *ante*, p. 494.

(*k*) *Re Parker's Trusts*, [1894] 1 Ch. 707, *ante*, p. 171.

(*l*) But by stat. 8 & 9 Vict. c. 112, after December 31st, 1845, all terms attendant on the inheritance shall determine, unless for the purpose of protection in certain cases against incumbrances. See *Cottrell v. Hughes*, 15 C. B. 532; *Plant v. Taylor*, 7 H. & N. 211; *Owen v. Owen*, 3 H. & C. 88.

(*m*) See *Watk. Convey.* 48, note by Morley and Coote.

(*n*) *Tiffin v. Tiffin*, 1 Vern. 1; *Thrupton v. Att.-Gen.*, 1 Vern. 341.

(*o*) *Dowse v. Percival*, 1 Vern. 134; *Thrupton v. Att.-Gen.*, 1 Vern. 341; *Gunter v. Gunter*, 23 Beav. 571. See also *Belaney v. Belaney*, L. R. 2 Eq. 210; 2 Ch. 138.

(*p*) See *per* Lord Ellenborough in *Taylor v. Plumer*, 3 M. & S. 578; and *per* Littledale, J., in *Ashby v. Ashby*, 7 B. & C. 453.

Hassall v. Smithers (*q*), a remittance in bills and notes for a specific purpose, viz., to answer acceptances, was received by an administrator, in consequence of the death of the party to whom the remittance was made: and it was held, that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Other instances may occur, where personal property may be in the hands of the executor, and yet not applicable to any but a special purpose: Thus, in *Parry v. Ashley* (*r*), the testator charged his real estate, which consisted of one house only, with an annuity to his widow, and subject to that annuity he devised it to Sarah Ashley in fee, and appointed her his executrix: The testator had insured the house; and on the expiration of the policy a few months after his death, it was renewed by Sarah Ashley: The house was afterwards burnt down: And Sir L. Shadwell, V.-C., held, that as she, being executrix, renewed the policy, it must be taken that she did so in the character of executrix (*s*): But his Honour was of opinion, that the proceeds of the policy could not be considered as part of the testator's personal estate, but that they were affected with a trust for the benefit of the parties interested in the real estate (*t*).

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in (*u*). An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor (*v*). The question as to what is, and what is not, a fraudulent conveyance against creditors, does not fall within the scope of this Work.

Hitherto the subject has been confined to the consideration of personal assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt, due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit*: But there

(*q*) 12 Ves. 119.

(*r*) 3 Sim. 97.

(*s*) It may here be mentioned that it has been held that an executor in trust has a sufficient interest to enable him to make an insurance in his own name on the life of a person who has granted an annuity to the testator: *Tidswell v. Ankerstein*, Peake, N. P. C. 151.

(*t*) See also *Cruikshank v. Roberts*, Madd. & Geld. 104; *Thacker v. Wilson*, 3 A. & E. 142; *Smedley v. Philpot*, 3 M. & W. 573, for other instances of assets in the hands of executors not being regarded as part of the general personal estate.

(*u*) *Richardson v. Smallwood*, 1 Jac. 552.

(*v*) *Shears v. Rogers*, 3 B. & Ad. 362; *Shee v. French*, 3 Drew. 716.

Property assigned in fraud of creditors.

Equitable assets in the hands of an executor.

are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law; and which, therefore, if administered at all, must be administered in equity: This latter portion of the estate in the hands of an executor or administrator is called *equitable assets*, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the Temporal Courts, and were formerly liable to legacies in the Spiritual, by the course of law: equitable assets are such as are liable only by the help of a Court of Equity (*x*).

Distinction
between legal
and equitable
assets.

Until quite recently a most important distinction existed with respect to the administration of these two kinds of assets: If they were legal, they must have been administered by the executor or administrator of the deceased in a due course of administration, having regard to those rules of priority among creditors which have already been investigated in this Treatise (*y*): But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants *pari passu*, without any regard to the priority in rank of one debt to another: The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract: Therefore, since a claimant upon equitable assets is under the necessity of going to a Court of Equity in order to reach them, that Court will act only according to the rule of doing justice to all creditors, without any distinction as to priority (*z*).

(*x*) See *Re Lacey*, [1907] 1 Ch. at p. 347.

(*y*) *Ante*, p. 762 *et seq.*

(*z*) *Plunket v. Penson*, 2 Atk. 294. It was decided by Hall, V.-C., that the separate estate of a married woman in earnings, under the Married Women's Property Act, 1870, which "shall be deemed and taken to be property held and settled to her separate use," became upon her death equitable assets, and divisible amongst her creditors *pari passu*: *Re Poole's Estate*, 6 C. D. 739. But in the case of *Shattock v. Shattock*, L. R. 2 Eq. 182, 194, Lord Romilly, M. R., had expressed his opinion that, in the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority, and not *pari passu*. Now, under the Act of 1882, s. 1 (1), she is capable of acquiring, holding, and disposing, by Will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee. See also *post*, p. 1294, note (*o*).

The importance, however, of the distinction between legal and equitable assets has been greatly diminished by two statutes. Distinction less important since 1869.

By Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46), it is enacted (*a*), that— 32 & 33 Vict. c. 46.

“In the administration of the estate of every person who shall die on or after January 1st, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal or is otherwise made or constituted a specialty debt, but all creditors of such person as well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or personal, any statute or other law to the contrary notwithstanding: Provided also that this Act shall not prejudice or affect any lien or charge or other security which any creditor may hold or be entitled to for the payment of his debt.”

And by stat. 38 & 39 Vict. c. 77, sect. 10 (Judicature Act, 1875) (*b*), it is enacted that— 38 & 39 Vict. c. 77, s. 10.

“In the administration by the Court of the assets of any person who may die after the commencement of this Act (November 1st, 1875) and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.”

It should be noticed that with regard to persons who died before January 1st, 1870, the old rules as to priority in administration remain applicable, and as to persons dying after that date and before November 1st, 1875, the old rules would still apply except that specialty and simple contract creditors stand on the same footing.

It must be observed that the true test, as to whether the assets are legal or equitable, is not whether the executor or Test whether assets are legal or equitable.

(*a*) See *ante*, p. 782, as to the effect of this Act.

(*b*) See *ante*, pp. 770, 785, as to the effect of sect. 10 of this Act.

administrator, but whether the *claimant* can reach them without resorting to a Court of Equity (c).

Whether the equity of redemption of a term of years is equitable or legal assets in the hands of an executor or administrator has been much discussed, and the reader is referred to the cases in the note below (d).

Equities of redemption not necessarily equitable assets.

It appears to be the better opinion that equities of redemption are not necessarily equitable assets (e). And in the view of an eminent writer (f), the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration; or in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets. So, in the case of *Cook v. Gregson* (g), Kindersley, V.-C. (applying the test whether the executor or administrator would take simply *virtute officii*), held that an equity of redemption on a mortgage of a sum of money charged on a real estate was legal assets: And his Honour said, that he thought the cases above cited as to mortgages for terms for years could not be supported. In the later case of *Shee v. French* (h), the same learned judge laid down that the question whether assets are legal or equitable depends on this, whether, if the case were before a Court of Law, on an issue of *plene administravit*, that Court would treat the property as assets, and the principle on which a Court of Law proceeds is to inquire whether the property came to the hands of the executors *virtute officii*: If it did, the Court of Law regards it as assets, applicable to the payment of the testator's debts; and then a Court of Equity treats it as legal assets (i).

Proceeds of sale of real estate equitable assets.

With respect to that portion of the property in the hands of an executor or administrator, which consists of the proceeds of

(c) See, however, *Re Hadley*, [1909] 1 Ch. 20, *per* Cozens-Hardy, M. R.

(d) *The Creditors of Sir Charles Cox*, 3 P. Wms. 342; *Hartwell v. Chitters*, Amb. 308; *Sharpe v. Scarborough*, 4 Ves. 541; *Clay v. Willis*, 1 B. & C. 364; Wentw. Off. Ex. 14th edit. p. 186.

(e) See 2 Jarman on Wills, 6th edit. 2022; Story on Equity, Ch. ix. s. 551, note (1).

(f) Story on Equity, Ch. ix. s. 551.

(g) 20 Jur. 510; 3 Drewr. 547.

(h) 3 Drewr. 716.

(i) See *Att.-Gen. v. Brunning*, 8 H. L. C. 243, 256, 264, 265; *Christy v. Courtenay*, 26 Beav. 140; *Mutlow v. Mutlow*, 4 De G. & J. 539.

the sale of real estate, it was long ago settled that such proceeds were *equitable* and not legal assets (*j*).

And it is quite clear that the testator cannot alter the legal character of the property, by directing that it shall be considered as part of his personal estate (*k*). The price, however, of an estate contracted by the testator to be sold and afterwards received by the executor was legal and not equitable assets, since the executor was entitled to and did receive the purchase-money as executor by virtue of the probate (*l*).

Rights of legal preference are, however, controlled by a rule which formerly, before the stat. 32 & 33 Vict. c. 46, put specialty and simple contract creditors on an equality, was of great importance, and which is even now occasionally applicable, as for instance where a creditor executor has partly paid himself by retainer. The rule is that where the assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him until there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets (*m*).

Marshalling
of assets,
partly legal
and partly
equitable.

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or Will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees (*n*), and

Beneficial
interest under
a power.

(*j*) *Clay v. Willis*, 1 B. & O. 364; *Barker v. May*, 9 B. & O. 489; *Bain v. Sadler*, L. R. 12 Eq. 570. The case of *Lovegrove v. Cooper*, 2 Sm. & G. 271, is not law.

(*k*) See *per* Lord Tenterden, in *Barker v. May*, 9 B. & O. 489; *Re Walker*, [1908] 2 Ch. 705.

(*l*) *Att.-Gen. v. Brunning*, 8 H. L. C. 243, reversing the decision of the Exchequer, 4 H. & N. 94. Where a testator devised a freehold house to A., whom he appointed one of his executors charged with a sum of money payable within twelve months, this was held *equitable* assets in the hands of the executors: *Lowe v. Peskett*, 16 C. B. 500.

(*m*) *Morrice v. Bank of England*, Cas. temp. Talb. 220, by Lord Talbot; *Chapman v. Esgar*, 1 Sm. & G. 575; *Bain v. Sadler*, L. R. 12 Eq. 570.

(*n*) *Thompson v. Towne*, 2 Vern. 319; *Hinton v. Toyé*, 1 Atk. 465; *Bainton v. Ward*, 2 Atk. 172; *Townshend v. Windham*, 2 Ves. Sen. 9; *Pack v. Bathurst*, 3 Atk. 269; *Troughton v. Troughton*, 3 Atk. 656; *George v. Milbanke*, 9 Ves. 190; *Jenny v. Andrews*, 6 Mad. 264; *Williams v. Lomas*, 16 Beav. 1; *Platt v. Routh*, 6 M. & W. 789; *Re Hadley*, [1909] 1 Ch. 20; *Re Pryce*, [1911] 2 Ch. 286. Moreover, it has been held that resort cannot be had, in any case, to the appointed

having regard to the Married Women's Property Acts, 1882 and 1893, the law seems now the same as regards married women (o).

property, till all the testator's own property has been exhausted: *Fleming v. Buchanan*, 3 De G. M. & G. 976, explained in *Re Hadley*, *sup.*

(o) The cases of *Vaughan v. Vanderstegen*, 2 Drew. 165; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, L. R. 2 Eq. 182, go to show that where a married woman has property settled upon her for her separate use, she is capable of charging and making it liable to her general debts as if she were a *feme sole*; but if she has only a power she is not capable of charging or making it liable to her general debts, at all events, if the power is one which can be exercised only by Will. These cases seem to have been disapproved in the *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. O. 572; in *Mayd v. Field*, 3 C. D. 587; and in *Re Harvey's Estate*, 13 C. D. 216, which was followed in *Hodges v. Hodges*, 20 C. D. 749. Kay, J., however, in *Re Roper*, 39 C. D. 482, treated them as good law, and held that an appointment by a married woman by Will, in the exercise of a general power of appointment by deed or Will or by Will only, does not make the appointed property liable to engagements entered into by her on the credit of her separate estate prior to the commencement of the Married Women's Property Act, 1882, and that the exercise of the power did not make the appointed property liable as assets of the appointor. The learned judge, after stating that there is no doubt that in the case of a man who has a general power of appointment, and exercises it by Will in favour of volunteers, the property so appointed will be considered assets for the payment of his debts (as to which statement, see *per Joyce, J.*, in *Re Lawley*, [1902] 2 Ch. at p. 677), goes on to put to himself the question: Does this law apply to the case of a married woman? And says, speaking of the law before the Married Women's Property Act, 1882: "It would be strange if the law was that only the separate property which a married woman had at the time (of her engagement) should be liable to the exclusion of separate property acquired afterwards, but that nevertheless the exercise by Will of a general power of appointment would make the appointed fund, which never was her separate property, liable. Even if it could be said to become her separate property by the appointment, this would only be so at her death long after the engagement entered into, and therefore, according to *Pike v. Fitzgibbon*, 17 C. D. 454, the appointed property could not be made liable. . . . My opinion is that in cases not within the Married Women's Property Act, 1882, whether the power of appointment be by deed or Will, or by Will only, an appointment by the Will of a married woman does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. What the law may be as to cases falling within that Act, I express no opinion save this: that to make property appointed by the Will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her Will makes the property appointed her separate property, because it is only 'all separate property which she may thereafter acquire' which is by that Act rendered liable." In *Ex parte Gilchrist*, 17 Q. B. D. 521, it was held that the expression "separate property" in the Married Women's Property Act, 1882, does not include a general power of appointment by deed or Will of which she is the donee, but which she has not exercised. In *Re Ann, Wilson v. Ann*, [1894] 1 Ch. 549, Kekewich, J., held that the engagements which were entered into by a married woman during the coverture and which might have been proved against her separate estate, if, at the time of entering

But in order to raise this equity, the power must be actually executed; for equity never aids the non-execution of a power (*p*). And although creditors in these cases prevail over volunteers, yet if a party taking under voluntary appointment sell to a person *bonâ fide*, and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them (*q*).

In *Re Lawley* (*r*) the donee of a general testamentary power of appointment over a fund borrowed a sum of money, and as security for the loan covenanted forthwith to make a Will exercising the power so that the loan should be a first charge upon the fund; and he made a Will accordingly and died. It was contended that the rule laid down by Knight Bruce, L. J., in *Fleming v. Buchanan* (*s*), as being the settled law of the country, that "if a man having a power, and a power only, over personal estate to appoint it as he will, and exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, what-

The donee of a general testamentary power cannot by Will prefer one creditor to another.

into each contract in succession, she had separate estate, may be proved against the property appointed by her Will under her general power; but see *Re Fieldwick*, [1909] 1 Ch. 1. It is to be observed that the judgment of Kay, J., was dealing with a case not within the Married Women's Property Act, 1882, and does not, therefore, take into consideration the effect of sect. 4 of that Act, which provides that: "The execution of a general power by Will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." The Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), provides that—"1. Every contract hereafter entered into by a married woman, otherwise than as agent,

"(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into the contract;

"(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

As to an unexercised power to bequeath a death allowance out of funds of a friendly society not being assets, see *Ashby v. Costin*, 21 Q. B. D. 401.

(*p*) *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206.

(*q*) *George v. Milbanke*, 9 Ves. 190; *Hart v. Middlehurst*, 3 Atk. 377; Sugd. Pow. 8th edit. 477.

(*r*) [1902] 2 Ch. 673.

(*s*) 3 De G. M. & G. 976, 980.

(1903) A.C. 411 - H.L.

ever may be the intention or absence of intention upon his part," only applied where the appointment is to volunteers, and did not apply to the case under consideration. But it was held by Joyce, J., that the applicants had no priority as against the appointed fund over other creditors. This decision was affirmed by the Court of Appeal (*t*), where it was pointed out by Vaughan Williams, L. J., that the position of the lender, in whose favour the power was exercised, is that of a legatee taking by the bounty of the testator; he could not at any time before the death of the testator have asserted any title to or charge on this personal estate. In truth, every one taking under a Will is a volunteer, even though the testator may have been under some contractual obligation to make the appointment. The decision of the Court of Appeal was affirmed by the House of Lords (*u*), where Lord Lindley says that "it cannot now be denied that property appointed by Will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof. The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. . . . It is settled that, except by making a creditor an executor, a person disposing of his own property by Will cannot by his Will prefer one creditor to another, or make a gift by Will payable before a debt. A covenant to bequeath property by Will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by Will and not a preferential debt. The attempt to confine the rule to volunteers cannot, I think, now be supported when speaking of powers to appoint by Will."

A fund appointed under a general power becomes legal assets.

A fund appointed in exercise of a general testamentary power is not property passing to the executor "as such" within the meaning of sect. 9 (1) of the Finance Act, 1894, and consequently the estate duty payable in respect of the appointed fund is a first charge upon such fund, and is not payable out of the residuary estate and is not included in "testamentary expenses" (*x*).

(*t*) [1902] 2 Ch. 799.

(*u*) [1903] A. C. 411.

(*x*) *O'Grady v. Wilmot*, [1916] 2 A. C. 231, overruling *Re Hadley*, [1909] 1 Ch. 20, and distinguishing *Re Grimthorpe*, [1908] 2 Ch. 675.

CHAPTER THE SECOND.

REAL ASSETS: AND THE EXONERATION OF THE REAL ESTATE BY
THE PERSONAL: AND HEREWITH OF THE MARSHALLING OF
ASSETS.

SECTION I.

*Real Assets, and the Exoneration of the Real Estate by
the Personal.*

THE real estate of any person dying after January 1st, 1898, by virtue of the Land Transfer Act, 1897, s. 1, sub-s. (1), now devolves to and becomes vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him: and this section is by sub-sect. (2) made to apply to any real estate over which a person executes by Will a general power of appointment, as if it were real estate vested in him (a). Consequently such real estate devolves to and becomes vested in the personal representative *virtute officii* and is legal assets.

Sect. 2 (3) of the Land Transfer Act, 1897, provides as follows: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies" (b).

It is still necessary, however, to consider the subject of real assets as discussed in the last Edition of this Work in relation to the estates of persons dying before January 1st, 1898 (the

(a) *Ante*, p. 494.

(b) *Ante*, p. 1195.

commencement of the Land Transfer Act, 1897); and in respect to copyhold property excepted by sect. 1 (4) from the expression "real estate" as used in the Act (c), and also in respect to the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts, and legacies, and the liability of real estate to be charged with the payment of legacies.

Real assets in
the hands of
the heir:

Besides the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable, at the common law, to the extent of the real assets descended, for the payment of his ancestor's debts of a certain quality; viz., those due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs (d). But such real assets were not liable for simple contract debts, nor for specialty debts where the heirs were not expressed to be bound.

of the devisee:

Creditors by specialties which affected the heir, provided he had assets by descent, had not, at common law, the same remedy against the devisee of their debtor. To obviate this mischief, the statute of 3 Will. & Mary, c. 14, passed: which has been repealed and re-enacted with additional provisions calculated to remedy certain omissions in the former statute. By the Debts Recovery Act, 1830 (1 Will. IV. c. 47), after reciting that "it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, *covenants* (e), or other special-

(c) *Ante*, p. 494.

(d) After the Statute De Donis the heir expressed to be bound was bound only in respect of lands descending to him from the ancestor in fee simple. See Hood and Challis on Conveyancing and other Acts, 6th edit., p. 146. The heir is also liable on a judgment recovered against his ancestor, or a recognizance acknowledged by him: but he is chargeable only as *tenant of the land* and not as heir: and therefore an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor, but a *scire facias* only to have execution of the lands in his hands: 2 Saund. 7, note (4) to *Jeffreson v. Morton*. Although *scire facias* is not in terms abolished by the Judicature Act, yet Ord. XLII. r. 23 is apparently intended to be substituted for it.

(e) The former statute, giving the specialty creditor a remedy against the devisee (3 Will. & Mary, c. 14), did not extend to damages for breaches of covenant or contracts under seal made by the testator; and it was therefore held, that an action of covenant did not lie upon the statute against the heir and devisee to recover damages for a breach of covenant made by the deviser, but the remedy thereby given was confined to cases where the debt lies: *Wilson v. Knubley*, 7 East,

ties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their Wills or testaments, have, to the defrauding of such their creditors, by their last Wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; " it is, by sect. 2, enacted, " that all Wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons, whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same (f) by his, her or their last Wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them, with whom the person or persons making any such Wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, *covenant* or other specialty, binding his, her or their heirs), to be fraudulent, and clearly, absolutely and utterly

1 W. IV.
c. 47.

For remedy-
ing frauds
committed on
creditors by
Wills.

128. It was further held, in the construction of the old statute, that it applied only where a *debt*, in the ordinary sense of the word, existed between the parties in the lifetime of both; and therefore that an action of debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated so that in form they might be sued for in an action of debt: *Farley v. Briant*, 3 A. & E. 839. But such damages, though not a debt within this statute, are a debt payable out of the real estate of the testator, under a charge of debts thereon created by his Will: *Morse v. Tucker*, 5 Hare, 79. And a debt due on a covenant, though it be *debitum in presenti solvendum in futuro*, was held to be within the statute: *Coope v. Cresswell*, L. R. 2 Eq. 106, *coram* Kindersley, V.-C., L. R. 2 Ch. 112.

(f) This statute extends to cases of devisees not only where the deviser is seised in fee, but where he has the power to dispose of the subject-matter of the devise, which in terms includes every beneficial interest which he may possess. And the devisee of an equitable estate seems liable to an action of debt by the creditors of the deviser under the 3rd section of the Act, where the words " such devisee and devisees " can only refer to the 2nd section, which applies to devisees of every description of estate, legal or equitable; and upon a judgment obtained in such an action, execution may be taken out against the equitable devisee by the 10th section of the Statute of Frauds: *Coope v. Cresswell*, L. R. 2 Ch. 112, 121, *per* Lord Chelmsford; *Re Atkinson*, *post*, p. 1301.

1 W. IV.
c. 47.

void, frustrate, and of none effect (*g*); any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

Enabling
creditors to
recover on
bonds, &c.

Sect. 3. "For the means that such creditors may be enabled to recover upon such bonds, *covenants*, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her and their action and actions of debt or *covenant* upon the said bonds, covenants and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees (*h*), or the devisee or devisees of such first-mentioned devisee or devisees jointly by virtue of this Act: and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended" (*i*).

If there is no
heir-at-law,
action may be
maintained
against the
devisee.

Sect. 4. "If in any case there shall not be any heir-at-law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case, every creditor to whom by this Act relief is given, shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid" (*k*).

(*g*) It is not necessary to make the devise void that the intent of the devise was to defraud or hinder or delay creditors: *Coope v. Cresswell*, L. R. 2 Eq. 106.

(*h*) Equitable estates are within the statute, and the devisees, who as trustees have the legal estate, must be made defendants, but if there has been no alienation by them, they, personally, will not be liable, but upon a judgment obtained against them execution may be had against the whole estate. Alienation by the person having the beneficial interest will not prevent the action, but upon a judgment obtained against the legal devisees execution may be had against the whole estate, but if any beneficial interest in it has been *bona fide* aliened before action (or rather judgment), equity would prevent the interest so aliened being affected by the execution: *Coope v. Cresswell*, L. R. 2 Ch. 112.

The right of a specialty creditor under 1 Will. IV. c. 47, seems to be a legal right. But his right is, until judgment, liable to be postponed to that of a prior alienee, even with merely an equitable title: *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567; *Re Moon*, [1907] 2 Ch. 304.

(*i*) The mere liability of the devisee to be sued under this Act does not make the debt his debt: *Re Taylor's Estate*, 8 Exch. 334.

(*k*) Under the statute of Will. & Mary, the specialty creditor could not maintain an action against the devisee alone, there being no heir: *Hunting v. Sheldrake*, 9 M. & W. 256.

Sect. 6. "In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bonâ fide* aliened (*l*) before the action brought, shall not be liable to such execution."

Heir-at-law, to be answerable for debts although he may sell the estate before action brought.

Sect. 8. "All and every the devisee and devisees made liable by this Act shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements and hereditaments to him or them devised, shall be aliened before the action brought" (*m*).

Devisees to be liable the same as heirs-at-law.

Sect. 9 made the real property of a deceased trader assets to be administered in Courts of Equity for the benefit of creditors by simple contract or by specialty as they are for the benefit of creditors by specialty where the heirs were bound.

Traders' estates shall be assets to be administered in Courts of Equity.

The principle was extended further, by the stat. 3 & 4 Will. IV. c. 104, which after reciting that it is expedient that "the payments of the debts of all persons shall be secured more effectually," it is enacted, "that from and after the passing of this Act (August 29th, 1833), when any person shall dies seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate,

3 & 4 W. IV. c. 104.

Freehold and copyhold estates of persons dying

(*l*) A conveyance by old to new trustees is not such an alienation as would prevent the action: nor is a mortgage by an equitable tenant for life such an alienation, though a Court of Equity would protect the mortgaged interests against execution: *Coope v. Cresswell*, L. R. 2 Ch. 112.

(*m*) The liability under this Act of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that on the alienation the debts become his own debts to the extent of the land alienated: *Re Hedgeley*, 34 C. D. 379. An equitable tenant for life is a "devisee" within this section, and consequently a *bonâ fide* alienation by such a devisee before action brought will be protected, there being no difference for this purpose between the alienance of an equitable and the alienance of a legal interest: *Re Atkinson*, [1908] 2 Ch. 307.

after 29th August, 1833, in all cases to be assets for the payment of simple contract or specialty debts.

whether freehold, customary-hold, or copyhold, which he shall not by his last Will have charged with or devised subject to the payment of his debts (*n*), the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty (*o*); and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heir-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands" (*p*).

The statutes 1 W. IV. c. 47, and 3 & 4 W. IV. c. 104, do not specifically charge the real assets, but make the heir or devisee personally liable.

It was held by Sir L. Shadwell, V.-C., in *Spackman v. Timbrell* (*q*), that the repealed statutes (3 Will. & Mary, c. 14, and 47 Geo. III. sess. 2, c. 74) did not specifically charge the real assets descended or devised with the debts of the ancestor, but made the heir or devisee liable, *personally*, to answer for the value of the assets descended or devised: Therefore where H., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee; and the son, on his marriage, settled the estates on his wife and children, and afterwards died, his Honour decided that the son's

(*n*) See *Ball v. Harris*, 4 My. & Cr. 268.

(*o*) Freeholds, over which a testator has a general power of appointment, and which he appoints by a last Will, are within this Act (but are only applicable as assets after all the testator's own property has been previously so applied): *Fleming v. Buchanan*, 3 De G. M. & G. 976. See also *ante*, p. 1293, *post*, p. 1331.

(*p*) It was held formerly that by virtue of this proviso a creditor by bond, in which the heirs are named, must be paid before a creditor by bond in which they are not named: *Richardson v. Jenkins*, 1 Drewr. 477; *Foster v. Handley*, 1 Sim. N. S. 200; *Re Burrell*, L. R. 9 Eq. 443; but this proviso would seem in effect to be repealed by Hinde Palmer's Act, 32 & 33 Vict. c. 46, which, however, would seem to leave untouched the rights of a specialty creditor on a specialty binding the heir who has obtained judgment prior to the commencement of the administration action: *Re Illidge*, 27 C. D. 478.

(*q*) 8 Sim. 253.

widow and children were entitled to hold the estates discharged from the debts of the father. So in *Richardson v. Horton* (r), a settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor: And Lord Langdale, M. R., laid down that, though by taking proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee, yet if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. And there does not appear to be any reason why these decisions should not be applied to the construction of the statutes now in operation (1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104) (s).

(r) 7 Beav. 112.

(s) See the observations of Lord Cottenham in *Pimm v. Insall*, 1 Mac. & G. 449, 458; of Romilly, M. R., in *Kinderley v. Jervis*, 22 Beav. 21, 22. See also *Dilkes v. Broadmead*, 2 Giff. 113; and *Price v. Price*, 35 C. D. 297, 305. In the latter case it was held that a creditor's action for general administration may be a sufficient *lis pendens*, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the *lis pendens*, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; but that a mere general claim for administration of the real and personal estate is insufficient. A covenant by an infant heiress and her intended husband, in marriage articles, to settle the descended estate on the issue of the marriage, is not an alienation such as to withdraw the estate from the claim of the ancestor's creditors: *Pimm v. Insall*, 1 Mac. & G. 449; 7 Hare, 193. Nor is a judgment entered up against an heir such an alienation: *Kinderley v. Jervis*, 22 Beav. 1. An equitable deposit with memorandum of charge by a legal devisee is an alienation, which *pro tanto* prevents a creditor of a testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. IV. c. 104: *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567; *Re Atkinson*, ante, p. 1301. It has been held that the stat. 3 & 4 Will. IV. c. 104, makes the lands themselves, and not merely the estate or interest of the deceased, assets for the payment of his debts. Therefore, if he dies without heirs, they are made assets against the lord claiming by escheat, notwithstanding his right is by title paramount: *Evans v. Brown*, 5 Beav. 114; *Downe v. Morris*, 3 Hare, 399; *Hughes v. Wells*, 9 Hare, 749. It has also been held that the Act charges the real estate of the deceased owner (where no such charge has been made by Will), not only with debts of every description actually due at his death, but also with all liabilities which may result out of the obligations entered into by him during his life: *Hamer's Devisees' Case*, 2 De G. M. & G. 366, overruling the decision in 3 De G. & Sm. 279. See also *Beale v. Symonds*, 16 Beav. 406. The widow's right to dower is not affected by the Act: *Spyer v. Hyatt*, 20 Beav. 621. As to the proceedings and proper parties for obtaining an order for the administration of the real estate of the deceased, see R. S. C. Ord. LV. r. 4, *post*, Pt. v. Bk. I. Ch. II.

Neither at law nor in equity is any charge created until judgment is obtained, and, the claim of a creditor under 3 & 4 Will. IV. c. 104, being a claim under an administration in equity, a prior equitable alienee will take precedence over the equitable judgment creditor (*t*). A simple contract creditor cannot get a judgment under 3 & 4 Will. IV. c. 104, giving him a priority; he can only get a judgment as against the heir-at-law, which will put the Court in a position to administer the real estate for the benefit of all the creditors, and under that judgment all the simple contract creditors would rank *pari passu* amongst themselves (*u*).

Primary
liability of
personal
estate to debts
of every
description:

It is, however, a well-known rule, that, as between the real and personal representatives of all deceased persons, the personal estate in the hands of the executor or administrator is the primary and natural fund, which must be resorted to in the first instance for the payment of debts, of every description, contracted by the testator or intestate.

But it is clear that this principle can only regulate the equitable administration of assets, and does not extend to the legal control of the creditor of the deceased; for in respect to persons dying before the commencement of the Land Transfer Act, 1897 (January 1st, 1898), it is discretionary with the creditor, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised: Hence, if the obligee of a bond bring an action of debt against the heir, the latter cannot plead that there is an executor who has assets (*x*).

In order, therefore, to support and enforce the primary liability of the personal estate, as between the representatives of the deceased debtor, it is an established rule in equity, that if the creditor proceeds against the real estate, descended or

(*t*) *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567; *Re Moon*, [1907] 2 Ch. 304.

(*u*) *Walters v. Walters*, 18 C. D. 182.

(*x*) Bro. Assets, per Descent, 33; *Davy v. Pepys*, Plowd. 439 b.; *Quarles v. Capell*, Dyer, 204 b.; *Davies v. Churchman*, 3 Lev. 189; *Galton v. Hancock*, 2 Atk. 423. And since as against the executor personal estate is the primary fund for the payment of debts, it follows that, in a case where the specialty debts exceed the personal estate, the executor can have no right of retainer in respect of a simple contract debt, even though the specialty debts may in fact have been paid out of the proceeds of real estate administered under 3 & 4 Will. IV. c. 104: *Walters v. Walters*, 18 C. D. 182. But see now *Re Harris*, [1914] 2 Ch. 395.

devised, the heir or devisee, who has sustained the loss, shall be allowed to stand in the place of the specialty creditor, to reimburse himself out of the personal estate in the hands of the executors (*y*): Provided such reimbursement will not prejudice *any of the creditors, or any other party having a claim equal to or more favoured than the heir or devisee respectively.*

consequent
right of heir
or devisee to
have the real
estate exoner-
ated by the
personal:

Thus, if the testator enters into a bond for himself and his heirs, and dies, and the obligee proceeds against the heir, and compels him to pay the debt out of the real assets, the heir may recover it out of the assets in the hands of the executor (*z*). And this exoneration is extended not only to the *hæres natus*, the heir-at-law, but also to the *hæres factus*, the general devisee (*a*), or a particular devisee (*b*).

Again, it is discretionary with a mortgagee, whether he will proceed, for the recovery of his mortgage debt, against the mortgaged land which has come to the heir or devisee of the mortgagor, or against the executor: But if the mortgagee recovers against the land, the heir or devisee is entitled (unless the case is within the operation of the stat. 17 & 18 Vict. c. 113) (*c*) to be reimbursed out of the personal estate of the mortgagor (*d*).

(*y*) Treat. Eq. B. 3, c. 2, s. 1. Accordingly, where a person domiciled in England, who was indebted in money upon bond, died intestate leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland; Lord Langdale, M. R., held, that the right of relief or demand against the personal estate, which, by the law of Scotland is given to the heir who has paid moveable debts, is capable of being made available in England: *Lord Winchelsea v. Garetty*, 2 Keen, 293. And in all cases, where, in the course of administrations in different countries, the question arises whether particular debts are properly and ultimately payable out of the personal estate, or are chargeable on the real estate of the deceased, the law of his domicile will govern, in cases of intestacy, and, in cases of testacy, his intention: Story's Conf. Ch. xiii. s. 528.

(*z*) *Armitage v. Metcalfe*, 1 Chanc. Cas. 74; *Anon.*, 2 Chanc. Cas. 4; Treat. Eq. B. 3, c. 2, s. 1.

(*a*) *Lutkins v. Leigh*, Cas. temp. Talb. 54. After *Lutkins v. Leigh*, and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was, under the Will, entitled as against a residuary legatee to have the mortgage paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling, the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty: *Re Smith*, [1899] 1 Ch. 371; and see *post*, p. 1328.

(*b*) *Pockley v. Pockley*, 2 Chanc. Cas. 84; *Galton v. Hancock*, 2 Atk. 436; Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (*c*).

(*c*) *Post*, p. 1312.

(*d*) *Cope v. Cope*, 2 Salk. 449. *Howell v. Price*, 1 P. Wms. 292;

but not to
prejudice a
person having
prior claim to
satisfaction.

But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied: And therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets, if by so doing he would disappoint any creditor (e) or any legatee, except the residuary legatee (f), or the widow's claim to *paraphernalia* (g).

It has, indeed, been laid down, as a general proposition, that the equity, to have the personal estate applied to the exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against specific or general legatees (h).

Johnson v. Milksopp, 2 Vern. 112; *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Galton v. Hancock*, 2 Atk. 436. And it will make no difference, that the devise is of the lands *subject to the incumbrances thereon*; for such a qualification is no more than what is implied, since the testator could not devise them otherwise: *Serle v. St. Eloy*, 2 P. Wms. 386; *Bickham v. Cruttwell*, 3 Mylne & Cr. 769; *Hickling v. Boyer*, 3 Mac. & G. 643, by Lord Truro. Accordingly where a testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children; it was held, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; because the gift was in effect a gift of the estates, subject to the mortgages; and the gift of an estate subject to a mortgage, does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate: *Wythe v. Henniker*, 2 M. & K. 635. But where a testator having an estate subject to a mortgage of 4,460*l.* created by himself, devised it to A. B. in fee, "he paying the mortgage thereon;" and devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagees, through the medium of his executors, 2,000*l.* to exonerate the estate; it was held that the words "he paying the mortgage thereon," imposed a duty on the devisee and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded 2,000*l.*: *Lockhart v. Hardy*, 9 Beav. 379. See also *Goodwin v. Lee*, 1 Kay & J. 377; *Hatch v. Skelton*, 20 Beav. 453.

(e) *Bartholomew v. May*, 1 Atk. 487.

(f) *O'Neal v. Mead*, 1 P. Wms. 693; *Lutkins v. Leigh*, Cas. temp. Talb. 53; *Davis v. Gardiner*, 2 P. Wms. 190; *Rider v. Wager*, 2 P. Wms. 335; *Re Salt*, [1895] 2 Ch. 203; *Re Smith*, [1899] 1 Ch. 365 (*ante*, p. 1305, note (a)); *Re Roberts*, [1902] 2 Ch. 834. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold: *Halliwel v. Tanner*, 1 Russ. & M. 633; *Wythe v. Henniker*, 2 M. & K. 635; *Johnson v. Child*, 4 Hare, 87; *Secus*, where a contrary intention is apparent: *Middleton v. Middleton*, 15 Beav. 450.

(g) *Tipping v. Tipping*, 1 P. Wms. 736; *ante*, p. 592, note (k).

(h) *Hamilton v. Worley*, 2 Ves. Jun. 65; Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (e).

And this is unquestionably true with respect to the exoneration of the heir (*i*). But it appears to be clear that if a creditor, with a *general* lien on the land, as a mere bond creditor, recovers the bond debt against the real estate *devised*, the devisee will be entitled to exoneration out of the personal estate, to the disappointment of general legacies (*k*). Whether he would also be entitled to exoneration to the disappointment of *specific* legacies, is a question which, for some time, was doubtful (*l*). But it seems to be now settled, that the devisee would be entitled to compel the specific legatees to *contribute* to the payment of the debt, but not wholly to exonerate the land (*m*).

Before the Wills Act a residuary devise of real estate was treated as specific. It was at one time supposed that the effect of sect. 24 of that Act, in making Wills speak and take effect with reference to the real and personal estate comprised in them as if executed immediately before the death of the testator, was to alter this and to prevent a residuary devise of real estate

Residuary
devise of real
estate a
specific
devise.

(*i*) *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Snelson v. Corbett*, 3 Atk. 369; *Re Smith*, [1899] 1 Ch. 365.

(*k*) It is clear that general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land *devised*. See *post*, p. 1326. And therefore it seems to follow, that the devisee shall be exonerated out of the general legacies; besides, if it were otherwise, it would have the effect of making a devisee of land, who in every case is as much a specific devisee as a legatee of a specific legacy, bear the burden of the debt before the general pecuniary legatees.

(*l*) See *Cornewall v. Cornwall*, 12 Sim. 298.

(*m*) *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654; and see *post*, p. 1327. But the terms of the Will may show that as between the devisee and a specific legatee the testator intended that legatee to have priority. Thus in *Re Saunders-Davies*, 34 C. D. 482, a testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of five hundred years, on trust to raise by mortgage of the real estate or out of the rents and profits, portions of 5,000*l.* apiece for each of his younger children, with remainder in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and consequently the specifically bequeathed personal estate, and the real estate had to contribute, and it was held that as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency. The decision in this case seems on this point to be inconsistent with *Long v. Short*, 1 P. Wms. 403, but North, J., in his judgment points out, referring to the judgment of Lord Chancellor Brady in *Jackson v. Hamilton*, 9 Ir. Eq. 430, that the report of *Long v. Short* is inaccurate; *Re Saunders-Davies* was followed by Kekewich, J., in *Re Bowden*, [1894] 1 Ch. 693. See *post*, p. 1327, note (*a*); and cf. *Raikes v. Boulton*, 29 Beav. 43.

being treated as specific (*n*), but it is now established that there is nothing in the Act to alter the well settled rule of law as to the effect of a residuary devise, namely, that for the purpose of payment of debts it is to rank *pari passu* with specific devises (*o*).

The exoneration of the real estate confined to cases where the claim is the *proper debt* of the deceased.

It must be further observed that the exoneration of the real estate out of the personal is confined to cases, where the claim in question is the *proper debt* of the deceased; for if it be not so, his heir or devisee must take the land *cum onere*: Thus if a settlor of real estate in contemplation of marriage covenants for payment of the portions of children, or widow's jointure (*p*), or if a person makes a voluntary gift, by way of charge, and covenants for the payment of the money (*q*), the land will be the primary fund for payment; for in these cases the charge is in its nature real and the covenant only an additional security. Accordingly in *Graves v. Hicks* (*r*), a father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money: By his Will he directed his debts to be paid, first out of the residue of his personal estate, then, out of his money in the funds, and lastly, out of his residuary real estates: And Sir L. Shadwell, V.-C., held, that the mortgaged estate was not to be exonerated from the portion out of the personal estate; his Honour being of opinion that, by the plain intention of the parties, the covenant of the father was meant to be auxiliary only to the charge upon his land; and that what he contracted to do, was to give security for the marriage portion (*s*).

Again, if a man buys an estate, subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on

(*n*) *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Barnwell v. Iremonger*, *ibid.* 242; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Rodhouse v. Mold*, 35 L. J. Ch. 67.

(*o*) *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, L. R. 10 Ch. 136; *Gibbins v. Eyden*, L. R. 7 Eq. 371.

(*p*) *Lanoy v. Athol*, 2 Atk. 444; *Edwards v. Freeman*, 2 P. Wms. 438; *Coventry v. Coventry*, 2 P. Wms. 222; *Loosemore v. Knapman*, Kay, 123. But see *Field v. Moore*, 7 De G. M. & G. 691, where the provision was first secured by a covenant creating a debt to which the covenant for securing the charge was manifestly auxiliary.

(*q*) *Wilson v. Darlington*, 1 Cox, 172; *Ex parte Digby*, 1 Jac. 253.

(*r*) 6 Sim. 398.

(*s*) See also *Ibbetson v. Ibbetson*, 12 Sim. 206; *Jenkinson v. Harcourt*, Kay, 688; *Re Anthony*, [1893] 3 Ch. 498.

the personal estate, as the primary fund for payment (*t*). So if an estate descends on an heir-at-law (*u*), or is devised (*x*), charged with a mortgaged debt, and the heir or devisee dies, leaving the debt unpaid, the land will be the fund for its payment, and not the personal estate of the deceased heir or devisee (*y*): In other words, the principle only extends to incumbrances created by the testator or ancestor himself.

And even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt, if the money borrowed was for the purpose of paying off the debts (*z*) or legacies (*a*) of the ancestor or devisor; and the law will be the same, if a bond (*b*) or note of hand (*c*) is given by the heir or devisee for the payment of debts or legacies charged on the land. However, in the case of *Barham v. Lord Thanet* (*d*), a mortgage was made of the manor and lands of Silsden and other valuable estates, to secure a debt of 80,000*l.* and interest: The mortgagor died intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 30,000*l.* part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed conveying the manor and lands of Silsden to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption, altogether different from the prior equity of redemption, and the interest reserved being five per cent. instead of four and a half per cent., which was the

(*t*) Coote, Mortg. 786 *et seq.*, 8th edit.

(*u*) *Noel v. Lord Henley*, 7 Price, 241; *S. C.* in Dom. Proc. 12 Price, 213; *Re Leeming*, 3 De G. F. & J. 43.

(*x*) *Perkins v. Baynton*, 2 P. Wms. 664, note to *Evelyn v. Evelyn*; Coote, Mortg., 8th ed. 788.

(*y*) *Scott v. Beecher*, 5 Madd. 96. See also *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Lord Clarendon v. Barham*, 1 Y. & C. Ch. C. 688; *Re Taylor's Estate*, 1 Exch. 384; *Swainson v. Swainson*, 6 De G. M. & G. 648; *Hepworth v. Hill*, 30 Beav. 484, *per Romilly, M. R.*; but see *Bond v. England*, 2 K. & J. 44.

(*z*) *Tankerville v. Fawcett*, 1 Cox, 237; *Perkins v. Baynton*, 2 P. Wms. 664 (note to *Evelyn v. Evelyn*); Coote, Mortg., 8th ed. 788.

(*a*) *Basset v. Percival*, 1 Cox, 268; *S. C.*, 2 P. Wms. 664, note; Coote, Mortg., 8th ed. 788.

(*b*) *Billinghurst v. Walker*, 2 Bro. C. C. 604; *Woods v. Huntingford*, 3 Ves. 131, by Lord Alvanley; Coote, Mortg., 8th ed. 789.

(*c*) *Mattheson v. Lordwicke*, 2 P. Wms. 665, note.

(*d*) 3 M. & K. 607. This case was followed by *Romilly, M. R.*, in *Bagot v. Bagot*, 34 Beav. 134.

rate reserved in the original mortgage: And it was held by Sir J. Leach, M. R., that it was in effect a new mortgage by the heir, and the 30,000*l.* was thereby constituted his personal debt. In *Townsend v. Mostyn (e)*, the rule was laid down by Romilly, M. R., that where the owner of property adds mortgages of his own to other mortgages created by his ancestor and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt.

It must here be observed, that although the debt is not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own*: in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt (*f*).

But it requires clear evidence of intention to make the debt his own: Thus a charge by Will of debts, generally, on his real and *personal* estate, will not be sufficient of itself to shift the *onus* from land which came to him already mortgaged, whether by descent, or by devise, or by sale (*g*). So, in cases where the lands came to the deceased by descent or devise, his concurrence in the deed, and his personal covenant for payment of the money, on assignment or transfer of the mortgage, being only by way of additional security to the mortgagee, will not alter the burthen, as between his real and personal representatives (*h*). The same principle applies, if other estates are added to the security on a further sum being lent (*i*), or if there be a covenant on his part for increasing the rate of interest (*k*). And

(*e*) 26 Beav. 76.

(*f*) See *Bruce v. Morice*, 2 De G. & Sm. 389.

(*g*) *Lawson v. Hudson*, 1 Bro. Chanc. Cas. 58; *Ancaster v. Mayer*, 1 Bro. Chanc. Cas. 454; *Hamilton v. Worley*, 2 Ves. 62; *Butler v. Butler*, 5 Ves. 534; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 290. See *post*, p. 1315 *et seq.*

(*h*) *Bagot v. Oughton*, 1 P. Wms. 347; *Evelyn v. Evelyn*, 2 P. Wms. 664; *Leman v. Newnham*, 1 Ves. Sen. 52; *Barham v. Lord Thanet*, 3 M. & K. 607, 622; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Hedges v. Hedges*, 5 De G. & Sm. 330. So where there had been a mortgage of gavelkind lands, which, upon the death of the mortgagee intestate, descended to his two brothers as coparceners, and the elder brother, who was the common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money; it was held that he did not thereby make the mortgage money his personal debt: *Barham v. Lord Thanet*, 3 M. & K. 607.

(*i*) *Ancaster v. Mayer*, 1 Bro. Chanc. Cas. 454, 464.

(*k*) *Shafto v. Shafto*, 1 Cox, 607; 2 P. Wms. 664, note.

it seems that if the sums borrowed by him, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will charge the real estate with the whole (*l*). In case the deceased was a purchaser of the equity of redemption, the rule (apart from Locke King's Act, 17 & 18 Vict. c. 113, the application of which may be negatived) may, perhaps, be stated to be, that unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, it will be considered, as between his real and personal representatives, a charge on the land (*m*): And the mere covenanting with the mortgagor to pay the debt will not make it his personal debt (*n*). If, however, the purchaser *borrow*s a sum of money to enable him to complete his contract, and the estate is, on the purchase, limited to the lender either for a term of years, or in fee, by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage (*o*).

(*l*) *Lewis v. Nangle*, Ambl. 150; *S. C.*, 2 P. Wms. 664, note. This latter doctrine must, it should seem, be received with much caution: Coote, Mortg., 8th ed. 787.

(*m*) Sugd. V. & P. 14th edit. 195. Where, however, the deceased described himself, in his Will, as having purchased a property, subject to a mortgage, but it appeared, on an examination of the history of the transaction, that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt, Lord Cottenham held, that the personal estate was primarily liable: For that if a man borrows money in the name of a trustee, the debt is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed: *Bickham v. Cruttwell*, 3 My. & Cr. 763.

(*n*) Sugd. V. & P. 14th edit. 195. "I entirely concur," said Sir John Leach, M. R., in *Barham v. Lord Thanet*, 3 M. & K. 624, "in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate subject to a mortgage, who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage-money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage-money to be deducted from the price." A distinction has been made between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case it has been considered, the personal estate of the purchaser will be the primary fund: *Parsons v. Freeman*, 2 P. Wms. 664, note (1); *Earl of Belvidere v. Rochfort*, 5 Bro. P. C. 299, Toml. edit.; see Jarman on Wills, 6th edit. 2043 *et seq.*

(*o*) *Waring v. Ward*, 5 Ves. 670; *S. C.*, 7 Ves. 332; *Mills v. United*

[Locke King's Act.]
17 & 18 Vict.
c. 113: After
Dec. 31, 1854,
heir or devisee
of real estate
not to claim
payment of
mortgage out
of personal
assets.

By stat. 17 & 18 Vict. c. 113, it is enacted that "when any person shall, after December 31st, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his Will or Deed, or other document, have signified any contrary or other intention (*p*), the heir or

Counties Bank, [1912] 1 Ch. 231. See also *Marquis of Bute v. Cunyng-hame*, 2 Russ. Chanc. Cas. 275. So where A. B. purchased an estate in consideration of an annuity, which was thereupon charged on the purchase, and also upon another estate, and A. B. covenanted to pay it, his personal estate was held primarily liable for the payments *Yonge v. Furse*, 20 Beav. 380.

(*p*) As to what amounts to a signification of a "contrary or other intention," there were, after the passing of the Act, a series of cases in which it was held that directions by a testator that his debts should be paid out of his personal estate might be sufficient indication of intention on the part of the testator that land should not, under the Act, be primarily liable to the payment of the mortgage debt. These decisions led to the passing of 30 & 31 Vict. c. 69 (*post*, p. 1314), expressly enacting that such direction shall not be a sufficient indication, and the cases are therefore of no importance except in the case of testators dying prior to or on December 31st, 1867. Moreover, Locke King's Act Amendment Act, 1877, 40 & 41 Vict. c. 34 (*post*, p. 1315), enacts that such contrary intention shall not be deemed to be signified by a charge of, or a direction for payment of, debts upon or out of residuary real or personal estate or residuary real estate. Lord Romilly, in *Brownson v. Lawrance*, L. R. 6 Eq. 1, decided that the fact that one of two properties comprised in the same mortgage is specifically devised was sufficient to exclude the principal Act, and make the estate which passed under the residuary devise *prima facie* liable to the whole of the mortgage debt; but this case cannot, it seems, now be regarded as good law, and Jessel, M. R., in *Sackville v. Smyth*, L. R. 17 Eq. 153, refused to follow it; and in a case where a testator dying after 30 & 31 Vict. c. 69, who was entitled to an estate subject to a mortgage, devised part of it to his widow for life, and the remainder to his residuary devisee, and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate, he held that no contrary or other intention was shown within the meaning of Locke King's Act, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage. And Malins, V.-C., in *Gibbins v. Eyden*, L. R. 7 Eq. 371, pointed out that Lord Romilly, in *Brownson v. Lawrance*, had probably overlooked the fact that *Hensman v. Fryer*, L. R. 3 Ch. 420, had decided that a residuary devise, notwithstanding the Wills Act, was specific. And North, J., in *Re Smith*, 33 O. D. 195, dissented from *Brownson v. Lawrance*, and followed *Sackville v. Smyth* and *Gibbins v. Eyden*. In the case of *Re Newmarch*, 9 O. D. 12, Jessel, M. R., after the passing of 30 & 31 Vict. c. 69, decided that a charge of debts on a part of a testator's real estate, viz., his residuary real estate, in exoneration of the rest, without specially referring to his mortgage debts, is not an expression of a contrary intention sufficient to exonerate the mortgaged estate; and that, as Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons, the devisees, in the absence of a sufficient expression of a contrary intention, must contribute according to the

devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt dis-

value of their respective portions. And where a testator by his Will, dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate," it was held that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate: *Re Rossiter*, 13 C. D. 355. A direction that a mortgage debt on Whiteacre shall be paid out of the proceeds of sale of Blackacre exonerates Whiteacre to the extent of those proceeds, but does not indicate a general contrary intention so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency: *Re Birch*, [1909] 1 Ch. 787. It is to be observed that where real and personal estate are comprised in the same mortgage, there is nothing in Locke King's Act to make the real estate the primary fund to bear the whole mortgage debt: this must depend on the intention of the mortgagor: *Trestrail v. Mason*, 7 C. D. 655; *Leonino v. Leonino*, 10 C. D. 460. See also *Marquis of Bute v. Cunynghame*, 2 Russ. 275; *Lipscomb v. Lipscomb*, L. R. 7 Eq. 501; *De Rochefort v. Dawes*, L. R. 12 Eq. 540. Where freehold and leasehold lands were mortgaged to secure the same advance by deeds of even date, each of which contained a covenant for payment of the mortgage debt and interest, the leasehold security not being collateral in the sense of secondary it was held that the mortgage debt was payable rateably out of the freeholds and leaseholds, and not primarily out of the freeholds. But otherwise, if on the construction one estate is to be considered as the primary and the other the secondary security: *Re Athill*, 16 C. D. 211. The principal Act was held to apply to equitable mortgages: *Pembroke v. Friend*, 1 Johns. & H. 132; *Coleby v. Coleby*, 12 Jur. N. S. 496; but only where there was a defined and specified charge on a specified estate: *Hepworth v. Hill*, 30 Beav. 476. The Act was also held to apply to copyholds: *Piper v. Piper*, 1 Johns. & H. 91; but not to leaseholds: *Solomon v. Solomon*, 33 L. J. Ch. 473; *Re Wormsley's Estate*, 4 C. D. 665. To remedy this the Act of 1877 (40 & 41 Vict. c. 34), *post*, p. 1315, was passed, by which the statutes 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, were held to extend to any land which shall be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money. It has been expressly decided in *Re Kershaw*, 37 C. D. 674, that the effect of this Act is to include leaseholds within the principal Act, and render them subject to a lien for unpaid purchase-money in exoneration of the general personal estate. It has also been held that a rent-charge issuing out of leasehold land is within the provisions of the Act of 1877: *Re Fraser*, [1904] 1 Ch. 111, *aff. on app.* [1904] 1 Ch. 726. It was held in *Dacre v. Patrickson*, 1 Dr. & Sm. 182, in a case where personalty went to the Crown, there being no next of kin, that the Act applied, and the devisee of a mortgaged estate was not entitled to be exonerated out of the personalty notwithstanding the words of the statute "as between the different persons claiming through or under the deceased person." See further as to what is an "interest in land" within the meaning of the statute, *Lewis v. Lewis*, L. R. 13 Eq. 218, in which case Malins, V.-C., decided that land devised upon trusts for conversion, and taken in its converted state, is not an interest in land. It is to be observed, however, that his judgment is partly based on the words "heir or devisee" being inapplicable to such a subject-matter, and that now, by 40 & 41 Vict. c. 34, the words "devisee or legatee or heir" are substituted. But the Act is not to be extended so as to

charged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof (*q*): Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise (*r*): Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any Will, Deed or document already made, or to be made before January 1st, 1855" (*s*).

30 & 31 Vict.
c. 69.

By stat. 30 & 31 Vict. c. 69, sect. 1 (*t*), it is enacted that "in

include every interest in land, and therefore a debenture giving a first charge on the land of the company entitles the legatee to have the charges on the debenture paid off out of the personal estate of the testator: *Re Chantrell*, [1907] W. N. 213; cf. *Re Bowerman*, [1908] 2 Ch. 340. Personal estate of a testator may *pro tanto* be converted into realty by a contract to purchase real estate, but if he dies without paying the purchase-money, leaving it equitably charged by way of lien on the land, no such conversion is effected, because by 40 & 41 Vict. c. 34, the devisee or heir is not entitled to have the purchase-money discharged or satisfied out of any other estate of the testator or intestate: *Re Cockcroft*, 24 C. D. 94. In the case of *Hudson v. Cook*, L. R. 13 Eq. 417, the purchaser had died intestate in 1869, and the case was not therefore affected by 40 & 41 Vict. c. 34, which did not apply the law as to vendor's lien to the case of an intestate dying before December 31st, 1877.

(*q*) See *Evans v. Wyatt*, 31 Beav. 217; *Trestrail v. Mason*, 7 C. D. 655; *Leonino v. Leonino*, 10 C. D. 460; and see last note.

(*r*) Where property is mortgaged in excess of its value, the deficiency must be made good out of the personal estate and not out of the other real estate: *Re Holt*, 85 L. J. Ch. 779.

(*s*) The heir of an intestate, who before January 1st, 1855, executed a mortgage reserving the equity of redemption to himself and his heirs, is not within this saving clause; for the heir claims by descent and not under any instrument: *Piper v. Piper*, 1 Johns. & H. 91. But a Will executed before January 1st, 1855, is a Will "already made" within the meaning of the clause, notwithstanding the testator died after that day. Nor does a mere republication by codicil, giving no new operation to the material dispositions of the Will, deprive it of that character: *Rolfe v. Perry*, 32 L. J. Ch. 471. This proviso only extends to a devisee; an heir-at-law taking by descent from an intestate is not within the proviso: *Nelson v. Page*, L. R. 7 Eq. 25.

(*t*) "The meaning of sect. 1, though not so happily expressed as it might be, appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention, contrary to the rule laid down in Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to

the construction of the Will of any person who may die after the 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate (*u*) shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act [*i.e.*, Locke King's Act, 1854], unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage (*v*) on any part of his real estate." And by sect. 2 it is enacted that "in the construction of this Act or of the said Act [*i.e.*, Locke King's Act, 1854], the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

In construing Wills general direction for payment of debts out of personalty not to include mortgage debts unless such intention expressly implied.

By Locke King's Act Amendment Act, 1877 (40 & 41 Vict. c. 34), it is enacted that the above-mentioned statutes shall "as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditament of *whatever tenure*, which shall at the time of his death be charged (*x*) with the payment of any sum or sums of money

40 & 41 Vict. c. 34.

refer to or describe them": *per* Giffard, V.-C., in *Nelson v. Page*, L. R. 7 Eq. 25.

(*u*) Although the Act only refers to a direction to pay debts out of personal estate, and says that such a direction shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the Act, yet Jessel, M. R., in *Re Newmarch*, 9 C. D. 12, 18, said: "It is impossible consistently with the Act to hold that a direction to pay them out of real estate, or out of a mixed estate of realty and personalty, does evince such a contrary intention." And this view seems to be embodied in the amending Act, 40 & 41 Vict. c. 34. See also *Elliott v. Dearsley*, 16 C. D. 322. But a direction to pay debts, except a mortgage debt on a particular property, shows that other mortgages are to be paid off: *Re Valpy*, [1906] 1 Ch. 531.

(*v*) It is not necessary that the debt or debts should be referred to as mortgage debts: all that is required is that the debt should be specifically described and identified in some way. Therefore where a testator directed his private debts to be paid out of the proceeds of certain life policies, and bequeathed the residue of his personalty subject to the payment of his trade debts, and after the date of his Will deposited the title deeds of real estate with his banker to secure an overdrawn trade account, it was held that the direction as to the payment of his trade debts amounted to a declaration of an intention contrary to or other than the rule established by the Act: *Re Fleck*, 37 C. D. 677.

(*x*) The Act applies to every equitable charge, including a charge created by statute, such as a charge for estate duty: *Re Bowerman*, [1908] 2 Ch. 340; and to land which has been delivered in execution under a duly registered writ of elegit to the judgment creditors of a testator: *Re Anthony*, [1892] 1 Ch. 450; [1893] 3 Ch. 498.

by way of mortgage, or any other equitable charge including any lien for unpaid purchase-money (*y*): and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall, within the meaning of the said Acts [*i.e.*, Locke King's Act, 1854, and the Act of 1867 above set forth] have signified *a contrary intention*: and such contrary intention shall not be deemed to be signified by a charge of, or direction for payment of debts upon or out of residuary real or personal estate or residuary real estate."

Exoneration
of real estate
charged with
debts and
legacies:

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment (*z*). With respect to the exoneration of the real estate from legacies, the general rule is equally clear as it is with respect to debts, that the personal estate is the first and natural fund for the payment of them; and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate, yet the personal estate remains undischarged from its primary liability to those claims (*a*).

Exoneration
of personal
estate:

Accordingly it has long been the settled rule of Courts of Equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a

(*y*) See *Re Cockcroft*, 24 C. D. 94; *Re Kidd*, [1894] 3 Ch. 558.

(*z*) As to what words will be sufficient to charge the real estate with debts and legacies, see 1 Rep. Leg. 571 *et seq.*, 3rd edit.; 2 Pow. Dev. 644 *et seq.*, Jarman's edit.; 2 Jarman on Wills, 6th edit. ch. xlv. See *ante*, p. 503.

(*a*) *Davies v. Ashford*, 15 Sim. 42; *Roberts v. Roberts*, 13 Sim. 336; *Elliott v. Dearsley*, 16 C. D. 322, which case must be taken to have overruled the dictum of Jessel, M. R., in *Gainsford v. Dunn*, L. R. 17 Eq. 405, on this point: *per* North, J., in *Re Boards*, [1895] 1 Ch. 499. Where, however, the testator directs payment of legacies out of a mixed fund, they are payable rateably out of realty and personalty: *Re Boards*, *ubi supra*; *post*, p. 1322. The rule that a charge of debts on real estate does not of itself exonerate the personal estate, applies to a case where a charge for payment of debts is created by deed: *French v. Chichester*, 2 Vern. 568. But no such rule applies to specific personal estate similarly charged, and therefore the charged personal estate must be applied in the first instance to the payment of the debts of the deceased chargor, to the exoneration of his general personal estate in the hands of his personal representative: *Trott v. Buchanan*, 28 C. D. 446.

declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes (*b*).

Nevertheless, it is clear, that a testator may, if he pleases, give the personal estate, as against his heir or any other real representative, discharged from the payment of his debts and legacies (*c*): And in such case the rules of exoneration in favour of the heir or the devisee, which have hitherto been the subject of this chapter, altogether fail of application.

Testator may expressly exonerate personal estate.

A most important question, therefore, arises, viz., what is the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable.

What expression by testator sufficient to exonerate personal estate.

In the earlier cases, it was laid down, that express words of exemption were necessary (*d*): But this rule has been relaxed by subsequent decisions: and it is now settled that the personal fund will be exempted, if the intention of the testator in its favour can be collected from a sound interpretation put upon the whole Will; in other words, if there appears from the whole testamentary disposition, taken together, an intention on the part of the testator so expressed, as to convince a judicial mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal (*e*).

It is obvious, therefore, that it is impossible to lay down any general rule as a guide upon this question; since the construction of every Will, in which the point arises, must depend merely upon the individual circumstances of the particular case: and in these, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between the most eminent judges who are called on to consider the circumstances. The difficulty with which the whole subject is surrounded is demonstrated by the following observations of Lord Eldon, in *Boottle v. Blundell* (*f*): "On a

(*b*) *Rhodes v. Rudge*, 1 Sim. 84, 85; *Walker v. Hardwicke*, 1 M. & K. 396; *Forrest v. Prescott*, L. R. 10 Eq. 545. See also *Re Ovey*, 31 O. D. 113; *Heron v. Poole*, 42 L. J. Ch. 348.

(*c*) *Ancaster v. Mayer*, 1 Bro. C. C. 462.

(*d*) *Fereyes v. Robertson*, Bunb. 302; *Dolman v. Smith*, Prec. Chanc. 458.

(*e*) By Lord Eldon, in *Boottle v. Blundell*, 1 Meriv. 230; *Dawes v. Scott*, 5 Russ. 32.

(*f*) 1 Meriv. 219.

comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the Will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention' and 'necessary implication,' to operate that exemption" (g).

In some of the earlier cases, evidence *dehors* the Will was received, to show the testator's intention: But on this point, Lord Eldon expressed his clear opinion, in *Boottle v. Blundell* (h), that with regard to circumstances *dehors* the Will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a Will, such question being fit to be decided only by an examination of the whole Will taken together (i).

The principal which has the greatest influence on the determination of this question, and which has been uniformly supported by all the cases, is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies: The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged (k).

(g) See the observations made on this passage by Knight Bruce, V.-C., in *Collis v. Robins*, 1 De G. & Sm. 141, and by Lord Halsbury, L. C., in *Kilford v. Blaney*, 31 C. D. 56, 61. And see as to the meaning of "necessary implication," *per* Lord Eldon in *Wilkinson v. Adam*, 1 V. & B. 422, 466.

(h) 1 Meriv. 216.

(i) See also *Inchiquin v. French*, 1 Cox, 9; *Stephenson v. Heathcote*, 1 Eden, 39; *Andrews v. Emmot*, 2 Bro. C. C. 297; *Standen v. Standen*, 2 Ves. 589; *Coote v. Coote*, 3 J. & Lat. 175. And see *per* Rigby, L. J., in *Re Grainger*, [1900] 2 Ch. 756; and *per* Lord Davey in *S. C.*, *sub nom. Higgins v. Dawson*, [1902] A.C. at p. 9.

(k) *Boottle v. Blundell*, 1 Meriv. 220.

In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided (*l*).

Thus it has been held, that a mere bequest of residuary personal estate by the term "residue" (*m*), or "*all* my personal estate" (*n*), or a like bequest, after previous sums or articles given out of it (*o*), or as of personal property "not otherwise disposed of" (*p*), is not singly sufficient to exempt the personal fund from its natural primary obligation to pay debts and legacies, although the real estate be also subjected to their payment by the Will. Again, charging the real estate ever so anxiously for the discharge of debts will not of itself exempt the personal (*q*): And whether the whole real estate be charged with debts and legacies (*r*), or a sufficient part of it (*s*), or a specific part of it (*t*), or it be given in trust to pay debts and legacies by sale of it (*u*), or a term of years be created out of it for those purposes (*v*), still the personal estate must be *first* applied. Again, neither a devise for payment of debts and legacies out of the rents of real estates (*x*), nor a devise on condition of the devisee paying the debts (*y*), nor a specific bequest of all the testator's personal estate to A. followed by a devise of real estate to B. subject to the payment of debts (*z*), nor a mere charge of funeral and testamentary expenses, as well as debts, on the land (*a*), nor an express charge of only *some* of

Cases where no sufficient expression by testator of intention to exonerate personal estate.

(*l*) *Ibid.* 230; *Bickham v. Cruttwell*, 3 My. & Cr. 763; *Collis v. Robins*, 1 De G. & Sm. 131, 141; *Trott v. Buchanan*, 28 O. D. 446, 453.

(*m*) *Samwell v. Wake*, 1 Bro. C. C. 144; *Tait v. Lord Northwick*, 4 Ves. 824.

(*n*) *Harewood v. Child*, cited Cas. temp. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324; *Brummel v. Prothero*, 3 Ves. 111; *Aldridge v. Wall-court*, 1 Ball. & Beat. 312. But see *post*, p. 1321.

(*o*) *Brydges v. Phillips*, 6 Ves. 567.

(*p*) *Hartley v. Hurle*, 5 Ves. 540.

(*q*) By Lord Loughborough, in *Tait v. Lord Northwick*, 4 Ves. 824.

(*r*) *Dolman v. Smith*, Prec. Chanc. 456.

(*s*) *Inchiquin v. French*, Ambl. 33, 37; *S. C.*, 1 Cox, 1; *Rhodes v. Rudge*, 1 Sim. 79.

(*t*) *White v. White*, 2 Vern. 43; *Bridgman v. Dove*, 3 Atk. 201; *Fitzgerald v. Field*, 1 Russ. Chanc. Cas. 428.

(*u*) *Inchiquin v. French*, 1 Cox, 1; *Hancox v. Abbey*, 11 Ves. 186.

(*v*) *Tower v. Rous*, 18 Ves. 132.

(*x*) *Hartley v. Hurle*, 5 Ves. 540.

(*y*) *Bridgman v. Dove*, 3 Atk. 201.

(*z*) *Re Banks*, [1905] 1 Ch. 547.

(*a*) *Walker v. Jackson*, 2 Atk. 626; *Stephenson v. Heathcote*, 1 Eden, 38; *Brydges v. Phillips*, 6 Ves. 570. See also *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; *McClelland v. Shaw*, 2 Scho. & Lef. 533; *Bootle v. Blundell*, 1 Meriv. 228, 229. But see *post*, p. 1320.

the debts upon the *personalty* (b), will exempt the personal fund from its legal primary liability (c).

A very strong inference against the claim of exemption of the personal estate appears to be the circumstance of its falling to the executor for his benefit *virtute officii* (d), prior to the statute 1 Will. IV. c. 40 (e), or in an instance of the gift of the personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence (f): but the converse of the proposition above stated, *i.e.*, the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate. Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of a personal estate, as a specific legacy, exempt from the payment of debts (g).

Again, the circumstance of the *same persons* being appointed trustees and executors has had considerable weight in inducing Judges to draw an inference, that the personal estate is not to be exempted (h): and Lord Alvanley has remarked (i), that the circumstance of the trustees not being the executors affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate (k).

It has been already stated, that a *mere charge* of funeral expenses upon the real estate will not exempt the personal fund from its primary liability to debts, &c. However, such a charge, in concurrence *with other circumstances*, has, in some cases, had importance attached to it, in exempting the personal estate from debts, &c., upon the reasoning, that, as funeral expenses primarily attach themselves to the personal fund in the hands of executors, the testator, by transferring that duty from them to the trustees of the real estate, must have intended to give the whole of the *personalty* to the legatee, specifically discharged from every obligation to which it was naturally liable (l). On the other

(b) *Watson v. Brickwood*, 9 Ves. 447.

(c) 1 Rep. Leg. 609, 3rd edit.

(d) *Gray v. Minnethorpe*, 3 Ves. 106.

(e) See *ante*, p. 1216.

(f) *Bromhall v. Wilbraham*, Cas. temp. Talb. 274; *Rhodes v. Rudge*, 1 Sim. 79.

(g) *Hall v. Brooker*, Gilb. Eq. Rep. 73.

(h) *Dolman v. Smith*, Prec. Chanc. 456; Coote, Mortg. 784, 8th edit.

(i) *Burton v. Knowlton*, 3 Ves. 108.

(k) Coote, Mortg. 784, 8th edit.

(l) *Burton v. Knowlton*, 3 Ves. 108. See also *Greene v. Greene*, 4 Madd. 157; *Michell v. Michell*, 5 Madd. 69.

hand, in some instances, the omission to charge funeral expenses on the real estate has been considered a circumstance of some weight, to show that the personal estate is not to be exempt, because it shows that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the Will, and being once broken in upon, the argument of its being specific is destroyed (*m*).

Again there has been occasion to state that the personalty is not exempted by the fact of the debts, &c., being charged upon the real estate, and a mere concomitant bequest of *all* the personal estate (*n*). However, in several instances, the circumstance of such a bequest, as distinguished from a gift of the *residue*, has been treated as having weight (*o*).

The limits of this Treatise will not allow that the different instances, in which the intention of the testator in favour of the exemption of the personal estate has been established, should be stated at large. The attention of the reader is particularly directed to the case of *Bootle v. Blundell* (*p*), in which almost every circumstance occurred which had been the subject of judicial observations in preceding cases, and upon which different Judges had formed different opinions as to their effect singly to exonerate the personal estate: and Lord Eldon, after going through a review of those cases, and making full observations upon every part of the Will, determined that the personal estate was exonerated from the primary liability to pay debts.

It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees, and therefore if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the

Where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails.

(*m*) *Brydges v. Phillips*, 6 Ves. 570.

(*n*) *Ante*, p. 1319.

(*o*) *Tower v. Rous*, 18 Ves. 139; *Bootle v. Blundell*, 1 Meriv. 228; *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Gilbertson v. Gilbertson*, 34 B. & W. 351; *Trott v. Buchanan*, 28 C. D. 446.

(*p*) 1 Meriv. 193.

benefit of the exoneration (*r*). In other words, where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails. And this principle applies *whether the property dealt with be realty or personalty* (*s*).

Legacies
given out of a
particular
fund:

It is necessary, before leaving this subject, to advert to a distinction which exists with respect to it, between debts and legacies. It has already appeared, that a pecuniary legacy, given generally, without specification of a particular fund for its payment, is primarily chargeable upon the personal estate, although in other parts of the Will, the real estate is made expressly liable to it; the rule of law considering the personal estate as the natural fund to bear such a charge (*t*): But if the pecuniary legacy be not given generally, but only out of a particular fund, there the legatee can have recourse only to the particular fund (*u*): and in this, there is an essential difference between debts and legacies (*x*).

exoneration of
the general
personal
estate.

Further, it may be stated as a rule that where a testator gives a certain portion of his personal estate and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate (*y*).

Mixed fund of
real and per-
sonal estate in
one mass
directed to be
applied to
payment of
debts and
legacies:

Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies (*z*):

(*r*) *Dacre v. Patrickson*, 1 Dr. & Sm. 182.

(*s*) *Kilford v. Blaney*, 31 C. D. 55, 56. See also *Fisher v. Fisher*, 2 Keen, 610.

(*t*) *Ante*, pp. 1316, 1318.

(*u*) *Kirke v. Kirke*, 4 Russ. Chanc. Cas. 435, 449. See *Spurway v. Glynn*, 9 Ves. 483; *Hancox v. Abbey*, 11 Ves. 179; *Gittins v. Steele*, 1 Swanst. 24; *Rickets v. Ladley*, 3 Russ. Chanc. Cas. 418; *Roberts v. Roberts*, 13 Sim. 336; *Dickin v. Edwards*, 4 Hare, 273, 276; *Fream v. Dowling*, 20 Beav. 624; *Ion v. Ashton*, 28 Beav. 379; *Sinnett v. Herbert*, L. R. 12 Eq. 201. But see also *Mann v. Copeland*, and the other cases cited, *ante*, p. 926. See further *Colville v. Middleton*, 3 Beav. 570.

(*x*) *Kirke v. Kirke*, 4 Russ. Chanc. Cas. 449. See *Noel v. Lord Henley*, 7 Price, 241; *S. C.* in Dom. Proc. 12 Price, 213, *nomine Noel v. Noel*.

(*y*) *Webb v. De Beauvoisin*, 31 Beav. 576; *Vernon v. Manvers*, 31 Beav. 623; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Trott v. Buchanan*, 28 C. D. 446.

(*z*) *Roberts v. Walker*, 1 Russ. & M. 572; *Dunk v. Fenner*, 2 Russ. & M. 557; *Fourdrin v. Gowdey*, 3 M. & K. 383; *Stocker v. Harbin*, 3 Beav. 479; *Salt v. Chattaway*, 3 Beav. 576; *West v. Cole*, 4 Y. & Coll. 460; *Young v. Hassard*, 1 Jones & Lat. 466; *Barry v. Harding*, *ibid.* 475; *Att.-Gen. v. Southgate*, 12 Sim. 77; *Shallcross v. Wright*,

But this rule is not applicable where the real and personal estate are not thrown into one mass, notwithstanding they are both given to the same persons, in trust therewith to pay debts and legacies; for in such case each fund retains its original character and its original liabilities (*a*). In order that the rule should apply it is not necessary that the testator should have directed an absolute conversion of the real estate; it is sufficient that he has shown an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid (*b*). The fact, however, that a mixed fund of personalty and proceeds of sale of realty is created will not exonerate the personalty from its primary liability in the absence of a direction to pay the debts and legacies out of the mixed fund (*c*).

It may here be mentioned that where there is a specific devise or a specific legacy, the presumption is that the testator intended that the devisee or legatee should have it in its integrity: Therefore a general charge of particular legacies on the whole real and personal estate will not be allowed to operate as a charge in derogation of such specific devise or legacy (*d*).

Specific bequests not affected by a general charge of legacies on real and personal estate.

The expression in a Will "all my just debts" includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the Will, and contracted in a country other than that of his domicile, and secured upon property in that country (*e*).

"All my just debts," meaning of.

12 Beav. 505; *Robinson v. Governors of London Hospital*, 10 Hare, 19. See also *Falkner v. Grace*, 9 Hare, 282; *Lord v. Wightwick*, 1 Drewr. 576; *Tatlock v. Jenkins*, Kay, 654; *Bentley v. Oldfield*, 19 Beav. 225, 228; *Simmons v. Rose*, 21 Beav. 37; 6 De G. M. & G. 411; *Allan v. Gott*, L. R. 7 Ch. 439; *Re Spencer Cooper*, [1908] 1 Ch. 130; *Re Smith*, [1913] 2 Ch. 216.

(*a*) *Boughton v. Boughton*, 1 H. L. C. 406; *Blann v. Bell*, 5 De G. & Sm. 658; *Tidd v. Lister*, 3 De G. M. & G. 857; *Tench v. Cheese*, 6 De G. M. & G. 453.

(*b*) *Allan v. Gott*, L. R. 7 Ch. 439.

(*c*) *Elliott v. Dearsley*, 16 C. D. 322; *Re Boards*, [1895] 1 Ch. 499.

(*d*) *Spong v. Spong*, 1 Dow. & C. 365; *ante*, p. 928, note (*y*). *Conron v. Conron*, 7 H. L. C. 168. See also *Mannox v. Greener*, L. R. 14 Eq. 456. "But, after all, it is a question of intention, and if there is something more or something other than the mere fact of a charge upon all his lands, then we have to consider from the whole Will what is the intention which we are to attribute to the testator": *per* Lord Herschell in *Bank of Ireland v. McCarthy*, [1898] A. C. 181, 185.

(*e*) *Maxwell v. Maxwell*, L. R. 4 H. L. 506.

SECTION II.

Marshalling Assets in favour of Creditors and Legatees.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*f*). This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund: And accordingly, a Court of Equity will, if necessary, control that election, and compel the one to resort to that fund, which the other cannot reach (*g*). But the more general practice is, to protect the claimant on the single fund by marshalling the assets.

In favour of
creditors.

Thus if the deceased died before the passing of the stat. 3 & 4 Will. IV. c. 104 (*h*), *i.e.*, before the 29th of August, 1833, and there were creditors of the deceased by specialty, and creditors by simple contract, and the specialty creditors, instead of resorting to the real assets, which they alone could reach, proceeded against the personal estate, to the exclusion of the simple contract creditors, who had no other fund, a Court of Equity would marshal the assets by permitting the simple contract creditors to stand in the place of the specialty creditors against the real assets, so far as the latter should have exhausted the personal (*i*): And the rule was the same with respect to real assets devised, as those descended (*k*).

(*f*) *Aldrich v. Cooper*, 8 Ves. 388; *Tidd v. Lister*, 3 De G. M. & G. 857, 872; *Haynes v. Forshaw*, 11 Hare, 93; *Legh v. Legh*, 15 Sim. 135; *Finch v. Shaw*, 19 Beav. 500; *Gibson v. Seagrim*, 20 Beav. 614; *South v. Bloxham*, 2 Hemm. & M. 457.

(*g*) See Fonbl. Treat. Eq. B. 3, c. 2, s. 6, note (*i*).

(*h*) See *ante*, p. 1301.

(*i*) But they shall not stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unsatisfied: *Cradock v. Piper*, 15 Sim. 301.

(*k*) *Selby v. Selby*, 4 Russ. Ch. C. 341. So covenantees, who claim under a merely voluntary covenant, have been held entitled, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts: *Lomas v. Wright*, 2 M. & K. 769; *Hales v. Cox*, 32 Beav. 118. But the assets will not be marshalled against judgment creditors: *Sharpe v. Lord Scarborough*, 4 Ves. 538. Now, however, it would seem that the Courts would not give any priority to a judgment creditor until a

So in the case of *Aldrich v. Cooper* (*l*), the testator died seised of freehold and copyhold estate, both of which were subject to mortgage: The personal estate was exhausted in payment of the mortgage and of two bonds upon which the testator was indebted to the mortgagee: And Lord Eldon held, that the simple contract creditors were entitled to stand in the place of the mortgagee *pro tanto*, against both the freehold and copyhold estate. So in another case (*m*), the specialty creditors of a deceased mortgagor of copyhold and freehold estate were allowed to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate (*n*).

Again, if the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate (*o*).

Formerly there was a doubt (*p*) as to how far this principle of equity could be applied to prevent a secured creditor from proving under a decree in a creditor's suit for the full amount of his debt, but now this question cannot arise, since by the Judicature Act, 1875, s. 10, the rules of bankruptcy on this point are imported into the administration by the Court of insolvent estates (*q*).

A similar equity will be extended in favour of legatees: Thus where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing

In favour of
legatee.

writ or order for the purpose of enforcing it has been registered under the Land Charges Registration and Searches Act, 1888. See Land Charges Act, 1900.

(*l*) 8 Ves. 381, overruling *Robinson v. Tonge*, 1 P. Wms. 679, note.

(*m*) *Gwynne v. Edwards*, 2 Russ. Ch. C. 289, *in notis*.

(*n*) The specialty creditors could not otherwise have reached the copyhold; for copyhold estates previous to the passing of the stat. 3 & 4 Will. IV. c. 104 (see *ante*, p. 1301), were not liable either at law or equity to the testator's debts, further than he had subjected them thereto.

(*o*) *Selby v. Selby*, 4 Russ. Ch. O. 336.

(*p*) *Greenwood v. Taylor*, 1 Russ. & M. 185; *Mason v. Bogg*, 2 M. & Cr. 443.

(*q*) See *ante*, p. 773.

for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have *descended* to the heir (r). "In the case of legatees," said Lord Eldon, in *Aldrich v. Cooper* (s), "against assets descended, a legatee has not so strong a claim to this species of equity as a creditor: but the mere bounty of the testator enables the legatees to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not."

And on the same principle it seems to be clear, that if, since the passing of the stat. 3 & 4 Will. IV. c. 104 (t), by which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the legatees would be allowed to stand in his place against the real assets which have descended.

But where the real estate does not descend to the heir, but is *devised* to a stranger, or to the heir taking as devisee (u), the

(r) *Bowaman v. Reeve*, Prec. Chanc. 578; *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Hanby v. Roberts*, Ambl. 128; cf. *Re Smith*, [1899] 1 Ch. 365, disapproving *Smith v. Smith*, 10 Ir. Ch. Rep. 89, 461. Therefore where the executor of a testator is a mortgagee of the real estate, as to which there was an intestacy, and also a legatee under his Will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands, the reason being, that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied: *Binns v. Nicholls*, L. R. 2 Eq. 256.

(s) 8 Ves. 396.

(t) *Ante*, p. 1301.

(u) See the MS. note of Serjeant Hill, in Blunt's edition of Ambler, p. 383, on the question whether a devise of land to the heir, which is void as to passing the estate, shall not exempt the lands from the legatees' right to stand in the place of specialty creditors. It has been held by Sir L. Shadwell, V.-C., that since the stat. 3 & 4 Will. IV. c. 106 (Act for the Amendment of the Law of Inheritance), wherever there is a devise to the heir, he must be considered to all intents and purposes as taking by devise and not by descent; for the third section of that statute is not to be considered as relating exclusively to the law of inheritance, but has also application with regard to assets: *Strickland v. Strickland*, 10 Sim. 374. And even in cases where the testator died before December 31st, 1833, so as not to be within the operation of this Act, the estates devised to the heir are not in equity to be applied to the payment of the testator's debts in priority to other parts of his estate devised to other persons: *Biederman v. Seymour*, 3 Beav. 368. As to having the personal estate applied in exoneration of the real, see *ante*, p. 1304 *et seq.*

assets are not marshalled in favour of general legatees, so as to throw the creditors on the real assets *devised* (v). And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise (x). If, indeed, the lands devised are *charged with debts*, the assets will be marshalled; for lands so charged are applicable to the payment of debts before general pecuniary legacies (y).

The Land Transfer Act, 1897, has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts and the personalty is exhausted in paying the debts (z).

With respect to specific legatees, the assets shall be so far marshalled against the specific devisees of real estate, upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, contribute to the payment of the specialty debt (a).

(v) *Clifton v. Burt*, 1 P. Wms. 678; *Scott v. Scott*, Ambl. 383; *Hanby v. Fisher*, Ambl. 128; *Keeling v. Brown*, 5 Ves. 359; *Aldrich v. Cooper*, 8 Ves. 397.

(x) *Mirehouse v. Scaife*, 2 M. & Cr. 695. But it must be remembered that, notwithstanding sect. 24 of the Wills Act, a residuary devise is still specific, and therefore a general pecuniary legatee has no right to have the assets marshalled as against the residuary devisee: *Hensman v. Fryer*, L. R. 3 Ch. 420; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Lancefield v. Iggulden*, L. R. 10 Ch. 136; the effect of which would be to throw the whole deficiency of the pecuniary legacy on the devised estate. It will be seen, however, that Lord Chelmsford, in *Hensman v. Fryer*, whilst deciding that the pecuniary legatee had no right, by marshalling in the sense above mentioned, to throw upon the devisee the whole deficiency, yet decided that the residuary real estate devised and the pecuniary legacies were respectively liable to contribute to the debts of the testator, which his general personal estate was insufficient to satisfy, *pro rata*. But this decision is contrary to the settled rule that personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to, and accordingly has not been followed: *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 234; *Tomkins v. Colthurst*, 1 C. D. 626; *Farquharson v. Floyer*, 3 C. D. 109.

(y) *Foster v. Cook*, 3 Bro. C. C. 347; *Paterson v. Scott*, 1 De G. M. & G. 531; *Surtees v. Parkin*, 19 Beav. 406; *Re Stokes* (1892), 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834. The law on this subject is not affected by the stat. 3 & 4 Will. IV. c. 104; *Rickard v. Barrett*, 3 Kay & J. 289; *Re Grainger*, *Dawson v. Higgins*, [1900] 2 Ch. 756. But general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land devised: *Ante*, p. 1307, note (k).

(z) *Re Kempster*, [1906] 1 Ch. 446; *Re Balls*, [1909] 1 Ch. 791.

(a) *Ante*, p. 1307; *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654. But a testator may by the terms of his Will exclude this rule if his intention be clear. Thus in *Bateman v. Hotchkin*, 10 Beav. 426, where a testator directed all

Before the passing of Locke King's Act and the Acts amending it, much discussion occurred as to the rights of general legatees in cases, where a creditor having a specific lien on the real estate resorted to the personalty, to have the assets marshalled against real assets, and also as to the law in the case of a vendor having an equitable lien for unpaid purchase-money. The general result of the authorities was in favour of the right of pecuniary legatees; but it is apprehended that no such discussion can arise hereafter in cases falling within the operation of the above Acts, since by them the real estate subject to the lien is made the primary fund for the payment of the debts secured by the lien; and the right of the pecuniary legatee, as well as that of residuary legatees and the next of kin, to marshal, can no longer be questioned (*b*). In *Re Smith* (*c*), the testator had under the doctrine of *Greville v. Browne* (*d*) charged pecuniary legacies on his residuary estate, and also directed certain mortgage debts on specifically devised real estate to be paid out of the residuary estate, and the Court had to consider what was the right of a devisee of real estate charged with a mortgage debt of the testator to have that debt paid out of residue as against the pecuniary legatees, and the learned judge said: "After *Lutkins v. Leigh* (*e*), and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the Will entitled, as against a residuary legatee, to have the mortgage debt paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of

his debts in the first place to be paid out of his personal estate, except his leaseholds, if sufficient, and if not he charged his real estate therewith, it was held by Lord Langdale that the specific legacies were liable to the payment of the debts in priority to the real estate. And in *Raikes v. Boneton*, 29 Beav. 41, Romilly, M. R., held that as between a portion charged on real estate and the person to whom the real estate was devised subject to the portion, the latter alone was liable to make good the deficiency of the testator's general personal estate. See also *Re Saunders-Davies*, 34 C. D. 482; and *Re Bawden*, [1894] 1 Ch. 693.

(*b*) For the cases in which these questions were discussed, see the earlier Editions of this Work.

(*c*) [1899] 1 Ch. 365.

(*d*) 7 H. L. C. 689; *Greville v. Browne* finally decided that where legacies are given generally, and there is a gift of the residue of the real and personal estate, the legacies are charged upon the entire residue.

(*e*) Cas. t. Tal. 53; *ante*, p. 1305.

marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty." . . . "The effect of the Real Estate Charges Act, 1854, commonly known as Locke King's Act, was to benefit the pecuniary legatee, and not to prejudice any rights he previously had in equity. So that if a testator by his Will negatived the application of the Act, without directing that the rule should not apply, then of course the rule had to be applied." An order was accordingly made giving priority to the pecuniary legacies over the mortgage debts (f).

Another instance of marshalling the assets in favour of legatees occurs where one or more legacies are charged on the real estate, and there is another legacy which is not so charged. There the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets (g).

It is clearly established that the Court will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal assets, when it would be void by touching an interest in land (h).

(f) As to marshalling assets in favour of rent-charges of mortgaged land as against the general personal estate, see *Re Fry*, [1912] 2 Ch. 86.

(g) *Bligh v. Lord Darnley*, 2 P. Wms. 620; *Bonner v. Bonner*, 13 Vos. 379; 2 M. & Cr. 700. There is no distinction between the case of a class of legacies and a case of individual legacies; for the Court presumes that the testator's intention in charging the land is that all the legacies shall be paid in full: *Scales v. Collins*, 9 Hare, 656.

(h) *Robinson v. Geldard*, 3 Mac. & G. 735, 744, by Lord Truro. But where the testator (so to speak) marshals his own assets by directing that a charitable legacy shall be paid out of pure personalty, the result of such a direction is that such legacy is payable in full out of pure personalty, in priority to other legacies: *Robinson v. Geldard*, 3 Mac. & G. 735. In this case Lord Truro said that he considered the charitable legacies so directed to be paid as being analogous to, if not strictly identical with, demonstrative legacies. This direction, however, does not exempt the charitable legacy from bearing its proportion of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly demonstrative: *Tempest v. Tempest*, 7 De G. M. & G. 470; *Baumont v. Oliveira*, L. R. 4 Ch. 309, affirming the decision of Stuart, V.-C., L. R. 6 Eq. 534. See also *Re Somers-Cocks*, [1895] 2 Ch. 449. But it should be noted that in the case of testators dying after August 5th, 1891, attempts to marshal for the benefit of a charity are rendered unnecessary, for by sect. 3 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), impure personalty has been exempted from the provisions of the Mortmain and Charitable Uses Act, 1888 (the statute now in force); and by sect. 3 land may be assured by Will for any charitable use, but must be, except as otherwise provided by the Act, sold within a year of the testator's death. Leaseholds apparently fall within the definition of land in sect. 3. See *Re Kershaw*, 37 C. D. 674, where the similar

Order in
which assets
are applied in
payment of
debts.

It seems convenient in reference to marshalling to set forth the order in which, in the absence of a contrary intention sufficiently expressed, assets are applied in the payment of debts:

- (1.) The general or residuary personalty, not specifically bequeathed or exonerated or exempted (*i*), including personalty subject to a general power of appointment and which passes under a residuary gift by virtue of sect. 27 of the Wills Act (*j*).
- (2.) Real estates appropriated to, and not merely charged with, the payment of debts (*k*).
- (3.) Real estates descended, whether acquired before or after the making of the Will (*l*).
- (4.) Real estates devised, charged with the payment of debts (*m*).
- (5.) General pecuniary legacies *pro ratâ* (*n*).

words "any land or other hereditaments of whatever tenure," in 40 & 41 Vict. c. 34, were construed to include leaseholds.

(*i*) *Manning v. Spooner*, 3 Ves. 117; *Harmood v. Oglander*, 8 Ves. 124. A share of residue which is subject to a secret trust is in the same position as a specific legacy: *Re Maddock*, [1902] 2 Ch. 220. As to the primary liability of mortgaged or charged lands to bear their own charges by Locke King's Acts, see *ante*, p. 1312 *et seq.*

As to the exoneration of personal estate as against the heirs or devisees of real estate, see *ante*, p. 1316 *et seq.* The principle was laid down in *Fisher v. Fisher*, 2 Keen, 610, and followed by *Wood v. Ordish*, 3 Sm. & G. 125, that as between the heir-at-law, the next of kin, and the residuary devisees and legatees, a lapsed share of real and personal estate ought to be applied in the same order as if the legatee had survived: *Ryves v. Ryves*, L. R. 11 Eq. 539. See also *Stead v. Hardaker*, L. R. 15 Eq. 175; *Blann v. Bell*, 7 C. D. 382; *Trethewy v. Helyar*, 4 C. D. 53, and *Fenton v. Wills*, 7 C. D. 33.

(*j*) *Re Hartley*, [1900] 1 Ch. 152.

(*k*) *Manning v. Spooner*, 3 Ves. 117; *Harmood v. Oglander*, 8 Ves. 124; *Phillips v. Parry*, 22 Beav. 279.

(*l*) *Wride v. Clarke*, 2 Bro. C. C. 261, note; *Harmood v. Oglander*, *ubi supra*; *Row v. Row*, L. R. 7 Eq. 414. Where the residuary personal estate is insufficient, the estate duty payable by the executor is payable out of undisposed-of realty in priority to specifically bequeathed personalty: *Re Pullen*, [1910] 1 Ch. 564. See as to real estate descended, not as undisposed of, but through forfeiture by the devisee under a Will, note (*o*), *infra*. Freeholds escheating to the lord are assets for the payment of debts, but whether in priority to or *pari passu* with lands specifically devised is doubtful: *Evans v. Brown*, 5 Beav. 114; *Hughes v. Wells*, 9 Ha. 749; cf. also *Prescott v. Tyler*, 1 Jur. 470; *Magit v. Johnson*, 2 Doug. 542.

(*m*) *Harmood v. Oglander*, *ubi supra*; *Davis v. Topp*, 1 Bro. C. C. 524. A lapsed share so charged is applied in the same order: *Ryves v. Ryves*, L. R. 11 Eq. 539.

(*n*) *Clifton v. Burt*, 1 P. W. 680; Lord Chelmsford, in *Hensman v. Fryer*, L. R. 3 Ch. 420, decided that pecuniary legatees and residuary devisees must contribute *pro ratâ*; but this decision has not been followed. See *ante*, p. 1327 (*x*). Kay, J., in *Re Bate*, 43 C. D. 600,

- (6.) Specific and residuary devises and specific legacies *pro ratâ* (o).
- (7.) Real and personal property which the testator has power to appoint, and which he has appointed, by his *Will* (p).
- (8.) The wife's paraphernalia are assets for her deceased husband's debts (q).

seems to have held that the classification of general pecuniary legacies after real property devised charged with debts is wrong, but this case has not been followed: *Re Stokes*, 67 L. T. 223; *Re Butler*, [1894] 3 Ch. 250; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834; *Re Kempster*, [1906] 1 Ch. 446.

(o) *Manning v. Spooner*, *ubi supra*; *Lancefield v. Iggulden*, L. R. 10 Ch. 136; *Farquharson v. Floyer*, 3 C. D. 109; *Tombs v. Rock*, 2 Coll. 490; *Jackson v. Pease*, L. R. 19 Eq. 96. Demonstrative legacies are specific only so far as the funds appropriated to them by the testator are sufficient to meet them: *Sellon v. Watts*, 9 W. R. 847. Real estate which had descended to a testator's heir-at-law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under the provisions of the Will, was held not liable to pay the costs of an action to administer the testator's estate in priority to specifically devised and bequeathed freehold and leasehold estates: *Hurst v. Hurst*, 28 C. D. 159. It is the settled practice of the Chancery Division that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that estate: *Re Middleton*, 19 C. D. 552; and this practice has not been altered or affected by the Land Transfer Act of 1897: *Re Jones*, [1902] 1 Ch. 92; *Re Betts*, [1907] 2 Ch. 149. As between real estate devised charged with portions and specifically bequeathed personalty the real estate must contribute in proportion to its full value and not in proportion to its value less the amount of the portions: *Re Saunders-Davies*, 34 C. D. 482.

(p) *Fleming v. Buchanan*, 3 D. M. & G. 976; *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; but see *Re Hartley*, [1900] 1 Ch. 152. As to property over which married women have a testamentary power, see *ante*, p. 1294 (o).

(q) *Parker v. Harvey*, 4 Bro. P. C. 609; *Ridout v. Earl Plymouth*, 2 Atk. 104; but see now *Masson, Templier & Co. v. De Fries*, [1909] 2 K. B. 831, *ante*, p. 593.

BOOK THE SECOND.

THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT
OF THE ACTS OF THE DECEASED; AND THE LIABILITY OF
AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF HIS OWN
ACTS.

CHAPTER THE FIRST.

THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT
OF THE ACTS OF THE DECEASED.

SECTION I.

The general question as to what Claims upon the Deceased survive against the Executor or Administrator.

In matters of
contract:

THE general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator (*a*). Therefore, it is clear that the

(*a*) Touchst. 482; 1 Saund. 216 (*a*), note (1) to *Wheatley v. Lane*. It was said by Willes, C. J., in *Sollers v. Lawrence*, Willes, 421, that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years." And therefore, notwithstanding the rule *actio personalis moritur cum personâ*, if an injury has been done to personal property of the plaintiff for relief arising out of which *assumpsit* could have been brought as in the case of actions against carriers and bailees, the executors of the deceased may be sued; that is to say, the executor may be sued on the obligation implied by law on which *assumpsit* would have lain against his testator: *Phillips v. Homfray*, 24 C. D. 439; *Batthyany v. Walford*, 36 C. D. 269; *Peebles v. The Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159 (where the alleged cause of action arose out of a statutory duty); *Blackmore v. White*, [1899] 1 Q. B. 293 (where the cause of action arose from a breach of an implied contract to discharge the customary obligation to repair a tenement according to the custom of the manor). And see further, as to the rule *actio personalis moritur cum personâ*, *ante*, p. 608 *et seq.*, and *post*, p. 1338.

executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances: or debts due on special contract, as for rent, or on bonds, covenants, and the like, under seal; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied (*b*). So an executor may be sued by the lord of a manor for a relief due from the testator (*c*).

In the case of *Eton College v. Beauchamp* (*d*), there was a rent issuing out of lands, and the tertenant died, leaving arrears due to Eton College: And it was decreed that though the person of the tertenant was not chargeable with the rent at law, but only the land by way of distress, yet his executor should pay the arrears as far as he had assets. So it is said, that where a man binds himself and his heirs, and leaves real assets, the heir, taking the profit, becomes so far a debtor, that his executor shall be charged (*e*).

In the case of *Wilson v. Tucker* (*f*), an action was sustained against the executor of an attorney for negligence by the deceased, in transacting the business of the plaintiff. Such claim may be regarded as arising *ex contractu*, and as founded on an implied promise to exercise reasonable care and skill in the performance of his duty as solicitor of the plaintiff (*g*).

And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, &c.: For, wherever in those cases the testator himself is liable to an action, his executors shall be liable also (*h*).

It must be observed, however, that certain *forms* of action do not, at the common law, survive against the executor or adminis-

(*b*) Bac. Abr. Exors. (P.) 1 Com. Dig. Admon. (B. 14).

(*c*) *St. John v. Bawdripp*, Noy, 43; Com. Dig. Admon. (B. 14).

(*d*) 1 Chanc. Cas. 121.

(*e*) Wentw. Off. Ex. 249, 256, 14th edit.; *Henningham's Case*, Dyer, 344, b. As to the power of an executor or administrator, liable as such, to the rent, covenants, or agreements contained in any conveyance on chief rent, or rent-charge granted or assigned to or made and entered into with the testator or intestate, to escape future liability thereunder, see the provisions of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 28; *ante*, p. 1081.

(*f*) 3 Stark. N. P. C. 154. See also *Dutton v. Tayley*, 18 Hill, MS. 285.

(*g*) *Blyth v. Fladgate*, [1891] 1 Ch. at p. 366 (*per* Stirling, J.).

(*h*) Bac. Abr. Exors. (P.) 2.

trator, as will hereafter be shown in the investigation of the subject of remedies generally (*i*): But other actions were substituted in their room upon the very same cause which do survive and lie against the executor or administrator (*k*).

The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it (*l*): for the executors or administrators of every person are implied in himself (*m*).

In *Harwood v. Hilliard* (*n*), a sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionately to the abatement; and the defendant's testator covenanted for himself and his executors, to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale, by the space of ten days; but it was not said, that such notice was to be given to his executors or administrators: And the whole Court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor and not to the testator.

It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein: Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator (*o*). So where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was held, that if A. departed within the term, a writ of covenant lay against the executor of the covenantor, without naming him (*p*). So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract (*q*). And

(*i*) *Post*, Pt. v. Bk. II. Ch. I.

(*k*) *Hambly v. Trott*, Cowp. 375, by Lord Mansfield.

(*l*) Wentw. Off. Ex. c. 11, pp. 239, 243, 14th edit.; *Bradbury v. Morgan*, 1 H. & C. 249, 255.

(*m*) By Lord Macclesfield in *Hyde v. Skinner*, 2 P. Wms. 197.

(*n*) 2 Mod. 268.

(*o*) Toller, 463.

(*p*) Bro. Covenant, 12 Bac. Abr. Exors. (P.) 1.

(*q*) *Quick v. Ludborrow*, 3 Bulstr. 30, by Coke, C. J. In the case of *Gordon v. Calvert*, 2 Sim. 253; 4 Russ. Chanc. Cas. 581, it was

in cases of this kind the executors will be liable even where the heir is named, and the executors are not named, in the contract (*r*).

Hence it appears that executors or administrators more actually represent their testator or intestate, than the heir does the ancestor: for if a man binds himself, his executors or administrators are bound, though not named; but it is not so of the heir by the common law, however large an amount of real assets may have descended to him (*s*): but by 3 & 4 Will. IV. c. 104, real estate of a deceased owner is chargeable with all liabilities which may arise out of obligations entered into by him during his life (*t*). And now sect. 59 of the Conveyancing Act, 1881, provides that "A covenant and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs and real estate, shall operate in law to bind the heirs and real estate as well as the executors and administrators and personal estate of the person making the same, as if the heirs were expressed."

The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate: for in such instances no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased (*u*). Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed (*x*). So a covenant by a

If contract is personal to testator, no liability of executor.

held that the executrix of a surety had no equity to support an injunction to restrain an action on the bond.

(*r*) *Williams v. Burrell*, 1 C. B. 402.

(*s*) Co. Lit. 209, *a*; Wentw. Off. Ex. c. 11, 239, 240, 14th edit.

(*t*) *Hamer's Devises' Case*, 2 De G. M. & G. 366; *ante*, p. 1303, *note* (*s*).

(*u*) *Hyde v. The Dean of Windsor*, Cro. Eliz. 533; *Siboni v. Kirkman*, 1 M. & W. 418, 423, *per* Parke, B. An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor: *Chamberlain v. Williamson*, 2 M. & S. 408. The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages: *Finlay v. Chirney*, 20 Q. B. D. 494; *Quirke v. Thomas*, [1915] 1 K. B. 798, *ante*, p. 619, *n.* (*q*).

(*x*) *Marshall v. Broadhurst*, 1 Tyrwh. 349, *by* Lord Lyndhurst.

(1831) 2 W. & J. 403
148 E.D. 1480

master for the instruction of his apprentice is personal to the master, and his executors are not liable upon it (*y*).

On a covenant that in consideration of a weekly payment to A. and his executors for a term certain A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it after his death (*z*).

So it has been said, that if a lessee for years covenanted for himself to repair the houses demised, omitting other words, he is bound to repair only during his life, and the executors or administrators are not bound (*a*). And it has also been said, that if a lessor covenants for himself only, to discharge the lessee of all quit-rents out of the land, this covenant is only personal, and will bind the covenantor only during his life (*b*). But if in these cases the words "during the term" be added in the covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term: in these cases, it appears, the executors and administrators also will be charged after his death (*c*).

In *Wentworth v. Cock* (*d*), the plaintiffs had entered into an agreement with one Cock to supply him with a certain quantity of slate immediately; and with a certain other quantity, monthly, at a fixed price; and with any further quantity, monthly, that he might require: He engaged to receive the slate, not exceeding 200 tons per month, and the agreement was to be in force till January 1st, 1838: An action having been brought against his administrator, for refusing to receive slate sent, in pursuance of the contract, after his death, and before January 1st, 1838, it was contended that the contract was personal to the deceased, and was not obligatory on his repre-

In *Wentworth v. Cock*, 10 A. & E. 45, Patteson, J., said that there was a case at Liverpool where a contract to build a lighthouse was held to be personal, on the ground of its being a matter of personal skill and science. So a contract to play a piano at a concert has been held to be one requiring personal skill, and to be conditional on the contractor being well enough to perform: *Robinson v. Davison*, L. R. 6 Exch. 269, 274.

(*y*) *Baxter v. Burfield*, Bott. P. L. pl. 696, 6th edit.; *S. C.*, 2 Stra. 1266; *ante*, p. 627.

(*z*) *Cooke v. Colcraft*, 2 W. Bl. 856; 3 Wils. 380.

(*a*) Touchst. 178. But see *Wentw. Off. Ex.* p. 250, 14th edit. *contrà*. And see now Conveyancing Act, 1881, s. 10.

(*b*) Touchst. 178; *Ingerly v. Hyde*, Dyer, 114, *a*. But see *Wentw. Off. Ex. ubi supra*. And see now Conveyancing Act, 1881, s. 11.

(*c*) Touchst. 178, 482. See also *Williams v. Burrell*, 1 C. B. 402.

(*d*) 10 A. & E. 42.

sentatives: But the Court of Queen's Bench held that the plaintiff might well sue the administrator: And Lord Denman said, it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for: And Littledale, J., observed, that the administrator was bound to pay damages, out of the assets, if he did not take the contract upon himself. In *Cooper v. Jarman* (e), where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord Romilly, M. R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

An underwriting contract by which A. agrees to place the share capital of a company is not a contract personal to A. but is one which can be enforced against his executors (f).

But it must be borne in mind that the authority of an agent is revoked by the death of his principal: consequently the agent cannot, generally speaking, sue the executor of the principal in respect of services as agent after his death, though performed in pursuance of a contract made with him in his lifetime (g). Thus, in *Campanari v. Woodburn* (g), where A. had agreed with B. that he would endeavour to sell a picture belonging to B., and that if he succeeded in selling the same, B. should pay him 100*l.*; and B. died before his picture was sold; it was held that A. could not recover the 100*l.* from B.'s executor.

It must here be observed, that in the case of *Perrot v. Austin* (i), it is said to have been resolved by the Court that if one covenants that his executors shall pay 10*l.*, no action lies for this against them. But Lord Mansfield, in *Plumer v. Marchant* (j), said that *Perrot v. Austin* was an extraordinary case, and there is a query in the very report (k). And in *Powell*

(e) L. R. 3 Eq. 98, followed in *Re Day*, [1898] 2 Ch. 510; *Re Hughes*, [1913] 2 Ch. 491. In *Re Day*, however, it was also held that where a testator contracted to build upon land belonging to the devisee by an independent title, the latter could not, in the absence of consideration for the contract, have the buildings completed at the cost of the personal estate.

(f) *Re Worthington*, [1914] 2 K. B. 299.

(g) As to persons acting under powers of attorney, see *ante*, p. 677.

(h) 15 C. B. 400. Cf. *Wilson v. Harper*, [1908] 2 Ch. 370.

(i) Cro. Eliz. 382.

(j) 3 Burr. 1383.

(k) In fact it appears from the statement of the case in Wentw. Off. Ex. p. 250, 14th edit., that the decision of *Perrot v. Austin* was merely as to the form of action. "In some cases," says that author, "no action of debt lieth upon a covenant to pay money; as if A.

v. *Graham* (l), it was held that an action might be sustained against an executor, upon a promise by the testator, that his executor should pay to the plaintiff the sum of 20*l.* in consideration that the plaintiff would continue in the service of the testator till his death; and that it was not necessary to aver any promise by the executor to pay it.

In matters of tort:

With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed (m): and at this day (unless the case falls within the statute 3 & 4 Will. IV. c. 42, s. 2, hereafter to be mentioned) (n), where the cause of action is founded upon any *malfeasance or misfeasance*, is a tort, or arises *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and in many other cases of the like kind, where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be not guilty, the rule is *actio personalis moritur cum personâ*; and if the person by whom the injury was committed does, no action of that kind can be brought against his executor or administrator (o). But the case is

covenant that his executor shall within a year, or such a time after his death, pay 10*l.* to B.; now for that no action of debt was maintainable against A. himself, it lieth not against his executor, but only an action of covenant; as was held in the late Queen's time." See *Randall v. Rigby*, 4 M. & W. 132, *per* Parke, B.; and *Ex parte Tindal*, 8 Bing. 402; S. C., 1 M. & Scott, 607, where Tindal, C. J., and Littledale, J., expressed their opinion, in which Lord Brougham concurred, that if a man covenants that his executors shall pay a sum of money after his death, this creates a debt just as much as if he himself had covenanted to pay it.

(l) 7 Taunt. 580.

(m) 1 Saund. 216, a, note (1) to *Wheatley v. Lane*; *Kirk v. Todd*, 21 C. D. 484, 489; *Re Duncan*, [1899] 1 Ch. 387.

(n) *Post*, p. 1346.

(o) 1 Saund. 216, a, note (1). An action for compensation for losses occasioned by misrepresentations contained in a prospectus of a company is like an action at law for deceit, and is therefore of a personal character, and the estate of a deceased director not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it: *Peek v. Gurney*, L. R. 6 H. L. 377. And though there is a decree against the deceased defendant for damages, yet if he die before they have been ascertained, the action, being one of tort, dies at the moment of his death, and the proceedings cannot be continued against the personal representatives of the deceased: *Davoren v. Wootton*, [1900] 1 I. R. 273. Similarly, where certain

different where the act is not a mere tort, but is a breach of a *quasi* contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty (*p*).

Accordingly, no action lies against an executor or administrator on a penal statute (*q*). So if a man, served with a *subpœna*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator (*r*). Again, if a sheriff, gaoler, or keeper of a prison, suffered one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, was entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by the statutes Westm. 2, and 1 Rich. II. c. 12; yet if the officer died, no action lay against his executor for the same; because the suffering the escape was a wrong of the nature of a

worthless shares were bought from a testator, the purchaser was held not entitled to prove against his estate in an administration action for damages for the testator's misrepresentation, the claim being for unliquidated damages, and not for the recovery of any asset which the plaintiff could claim: *Re Duncan*, [1899] 1 Ch. 387. In the case of *New Sombbrero Phosphate Co. v. Erlanger*, 5 C. D. 73 (affd. 3 App. Cas. 1218), the estate of a deceased member of a syndicate was held liable on the ground that he was a partner, and that the action therefore did not die with him. See as to form of defence in actions against a partnership, where one of the partners has died after writ and appearance, *Ellis v. Wadeson*, [1899] 1 Q. B. 714; and cf. *Phillips v. Homfray*, 24 C. D. 439, and *Re Shephard*, 43 C. D. 131, with regard to the case of the death of a partner after judgment has been obtained against the partnership. Nor can the executors of a deceased director be made liable in any proceeding which is of the nature of an action of negligence (*e.g.*, where it is sought to charge them for loss beyond the amount of the money placed in the directors' hands): *Overend, Gurney & Co. v. Gurney*, L. R. 4 Ch. 701; L. R. 5 H. L. 480. It has been held that the executors of a deceased director cannot be proceeded against by summons under sect. 165 of the Companies Act, 1862: *Re British Guardian Life Assurance Co.*, 14 C. D. 335. The maxim, "*Actio personalis*," &c., applies in the case of a deceased director who may have incurred liability under sect. 84 of the Companies (Consolidation) Act, 1908, and in the absence of proof that the estate of the director has benefited by his tortious act no right of action will survive: *Geipel v. Peach*, [1917] 2 Ch. 108. But the right of a director to recover contribution from the representative of a deceased director does survive: *Shepherd v. Bray*, [1906] 2 Ch. 235; [1907] 2 Ch. 571.

(*p*) *Concha v. Murrieta*, 40 C. D. at p. 553 (*per* Cotton, L. J.); *Peebles v. The Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159 (where the alleged cause of action arose out of a statutory duty to the deceased); *Blyth v. Fladgate*, [1891] 1 Ch. 366 (where the claim arose out of negligence of a solicitor).

(*q*) Wentw. Off. Ex. 255, 14th edit.

(*r*) *Ibid.*

trespass (*s*). So at the common law, if a man was appointed executor, and committed a *devastavit* and died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal tort in his testator, which died with the person (*t*). But now, by the statute 30 Car. II. c. 7, explained and made perpetual by 4 & 5 Will. & Mary, c. 24, s. 12, the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living (*u*).

in some cases
remedy might
be had in
another form:

In some, however, of the cases above mentioned, a remedy might be had against the executor or administrator in another form: Thus, although, at the common law, an action of trover upon a conversion of the testator dies with him, yet if the goods, &c., taken away, continue still *in specie*, in the hands of the executor or administrator of the wrong-doer, replevin or detinue will lie against such executor or administrator to recover them back (*x*): or trover, laying the conversion to have been by the executor (*y*): or, in case they are sold, an action for money had and received to recover their value (*z*). Again, an action on the custom of the realm against a common carrier is for a tort and supposed crime; and the plea is not guilty; therefore, at the common law, it will not lie against the carrier's executors: But an action of *assumpsit* will lie against

(*s*) *Anon.* Dyer, 271, *a*; *Whitacres v. Onsley*, Dyer, 322, *a*; *Perkinson v. Gilford*, Cro. Car. 540; Bro. Escape, 28 Exors. 100; Execution, 86 Parliament, 80; Wentw. Off. Ex. 254, 14th edit.; *Berwick v. Andrews*, Lord Raym. 973, by Lord Holt; *Hambly v. Trott*, 1 Cowp. 375; 1 Saund. 216, *a*, note (1). But debt lies against the executors of a sheriff, &c., upon a judgment obtained against the testator for an escape. See *post*, p. 1352.

(*t*) *Sir Brian Tucke's Case*, 3 Leon. 241; *Browne v. Collins*, 1 Vent. 292. But he was liable in equity: *Price v. Morgan*, 2 Chanc. Cas. 217.

(*u*) 1 Saund. 219, *d*, note to *Wheatley v. Lane*; *Coward v. Gregory*, L. R. 2 C. P. 153. In the case of *Hammond v. Gatcliffe*, Andr. 254, the Court were strongly inclined to be of opinion that an executor *de son tort* of an executor *de son tort* is not liable at common law for a *devastavit* committed by the first; and that such an executor is not within the statute of Car. II.; because (as Probyn, J., said) in the first part of the Act executors *de son tort* are not named, though afterwards they are expressly mentioned.

(*x*) *Le Mason v. Dixon*, W. Jones, 173, 174; 1 Saund. 217, note (1).

(*y*) *Hambly v. Trott*, 1 Cowp. 373.

(*z*) *Ibid.* 377; 1 Saund. 217, note (1).

them, upon the very same cause (a). So if a man take a horse of another, and bring him back again, an action of trespass will not lie, at the common law, against his executor, though it would against him: but an action for the use and hire of the horse will lie against the executor (b). So if a man deals as agent for another without authority, his executor, though he cannot be sued for the tort, may be made liable for breach of an implied warranty of authority (c).

So in the case of *Perkinson v. Gilford* (d), debt was brought against the executors of a sheriff, for money which he had levied under a *fi. fa.* and had not paid over: the not paying over the money was a misfeasance as well as a nonfeasance, yet it was determined, that by the receipt of the money, the sheriff became debtor, and that debt might be maintained for it; that is to say, though he was guilty of a breach of his duty as sheriff, and though no action could be maintained for that breach of duty after his death, yet for the money so recovered his executors were chargeable.

Again, at the common law, an action of trespass for mesne profits cannot be maintained against an executor or administrator (e): yet he is, perhaps, liable in an action for use and occupation for the rent up to the day of the demise in the action of ejection (f). But if there has been a recovery in

action for
mesne profits:

(a) Cowp. 375, by Lord Mansfield; S. P. by Sir J. Mansfield, C. J., in *Powell v. Layton*, 2 New Rep. 370.

(b) *Hamblly v. Trott*, 1 Cowp. 375, by Lord Mansfield.

(c) *Collen v. Wright*, 7 E. & B. 301; S. C. in Error, 8 E. & B. 647. Cf. *Halbot v. Lens*, [1901] 1 Ch. 344, and *Yonge v. Toynbee*, [1910] 1 K. B. 215. A public servant acting on behalf of the Crown is not, however, liable in such a case for a breach of implied warranty of authority: *Dunn v. Macdonald*, [1897] 1 Q. B. 401, 555; nor therefore could his executor be sued for such breach. Though the executor of an innkeeper cannot be sued in tort for the loss of a guest's goods (unless under stat. 3 & 4 Will. IV. c. 42, s. 2, *post*, p. 1343), he may be sued on an implied *assumpsit*: *Morgan v. Ravey*, 2 Fost. & F. 283; 6 H. & N. 265. Cf. *Robb v. Green*, [1895] 2 Q. B. 1, 315.

(d) Cro. Car. 539. Where an under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty, under 3 Geo. I. c. 15, s. 8 (see 50 & 51 Vict. c. 55, s. 25), wrongfully retained the proceeds of an execution, it was held by the Court of Appeal, affirming the Divisional Court, that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully recovered: *Gloucestershire Banking Co. v. Edwards*, 20 Q. B. D. 107. See also *Packington v. Culliford*, 1 Roll. Abr. 921, tit. Exors. II. pl. 2.

(e) *Pulteney v. Warren*, 6 Ves. 72, 86. See *per* Bowen and Fry, L. JJ., in *Phillips v. Homfray*, 24 C. D. 439, 458.

(f) 6 Ves. 86; *Turner v. Cameron's Coalbrook Co.*, 5 Exch. 932.

ejectment, it is clear that no action will lie against the executor for use and occupation for the rent subsequent to the day of demise laid in the declaration; because, having treated the holding as founded on trespass, the plaintiff cannot afterwards treat it as founded on contract (*g*): And in such instances the simple case of the death of the occupier will not sustain a bill in equity for an account of mesne profits under the head of accident (*h*): However, an account of mesne profits, since the title accrued, was decreed against executors, upon a special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of Law, and by an injunction at the instance of the occupier; who ultimately failed both at law and in equity (*i*): And in the case of *Monypenny v. Bristow* (*k*), the widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the Will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died: On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the suit was maintainable for the rents received during her continuance in possession (*l*).

action for
waste:

So an action of waste does not lie, at the common law, against an executor, for waste committed by his testator; it being a tort which dies with the person (*m*): Nor shall an executor be

(*g*) *Birch v. Wright*, 1 Term Rep. 378. See also *Pulteney v. Warren*, 6 Ves. 72, 87; and *Bridges v. Smyth*, 5 Bing. 410; *S. C.*, 2 Moo. & P. 740. However, the mere bringing of an ejectment and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation: *Cobb v. Carpenter*, 2 Campb. 14, note to *Balls v. Westwood*. *Secus, semble*, if the ejectment has been served on the lessee: *Jones v. Carter*, 15 M. & W. 718.

(*h*) *Pulteney v. Warren*, 6 Ves. 88.

(*i*) *Ib.* 72.

(*k*) 2 Russ. & M. 117.

(*l*) See also *Caton v. Coles*, L. R. 1 Eq. 581.

(*m*) 2 Inst. 302; 2 Roll. Abr. 828, pl. 7; 2 Saund. 252, note to *Green v. Cole*. A bill was brought against the executors of a jointress, to have satisfaction out of assets for permissive waste upon the jointure of the testatrix: But by Cowper, C., "The bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair, and in the common case, without some particular circumstances. there is not remedy in law or equity for permissive waste after the death of the particular tenant": *Turner v. Buck*, 22 Vin. Abr. p. 523, pl. 9, tit. Waste (s. a.). The produce, proceeds, or value of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors, and retaken from them. If he has

chargeable for the injury done by his testator in cutting down another man's trees: But for the benefit arising to his testator

wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary—as such lies against the executors of a tenant for life. By non-repairing a house, or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognizes in this indirect benefit which he may have received any ground for proceedings against his executors: *Phillips v. Homfray*, 24 C. D. 439, 455. The liability of a tenant for life for permissive waste seems to have been for a long time an open question. It was supposed that there was a passage by Lord Coke, 2 Inst. 145, affirming the liability, and Parke, B., in *Yellowly v. Gower*, 11 Exch. 274, 294, says, speaking of permissive waste: "We conceive that there is no doubt of the liability of tenants for term of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53." But Kay, J., in *Re Cartwright*, 41 C. D. 532, points out that Coke's words, 2 Inst. 145, only include permissive waste where there is an obligation to repair; and that in effect he says that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair. And the learned judge further refers to the case of *Powys v. Blagrove*, 4 De G. M. & G. 448, where Lord Cranworth, L. C., said that in the case of a tenant for life even legal liability for permissive waste was very doubtful, and decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. This view was followed by Kay, J., in the above-mentioned case, who expressly held that the estate of a legal tenant for life is not liable for permissive waste, after having had cited to him *Davies v. Davies*, 38 C. D. 499, in which Kekewich, J., held that a tenant for years is liable for permissive waste, and apparently would have held that a tenant for life was in the same position.

The liability of a tenant for life for permissive waste where there is an obligation to repair has never been doubted: *Woodhouse v. Walker*, 5 Q. B. D. 404; and see *Batthyany v. Walford*, 36 C. D. 269; *Blackmore v. White*, [1899] 1 Q. B. 293. As to leaseholds held upon trust to be enjoyed in specie, in *Re Courtier*, 34 C. D. 136, where the widow tenant for life had kept the property in the state in which it came to her, but denied that she was liable to do the repairs which had become necessary during the lifetime of the testator, it was decided that as between tenant for life and remainderman there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases, and that it was the duty of the trustees to repair the houses in accordance with the covenants in the leases out of the corpus of the estate (*per Cotton, L. J.*, at p. 139). In *Re Tomlinson*, [1898] 1 Ch. 232, where a testator, who died possessed of a leasehold house held by him on a repairing lease, bequeathed it directly (without the intervention of trustees) to his niece for life, and after her death to other persons absolutely, Kekewich, J., held, as between tenant for life and remaindermen, that the tenant for life was not bound to perform any of the covenants in the lease. North, J., in *Re Betty*, [1899] 1 Ch. 821, differed from Kekewich, J., in *Re Tomlinson*, and held that an equitable tenant for life of leaseholds under a Will is bound during the continuance of his interest as between himself and his testator's estate to perform the tenant's continuing obligations under the lease; but that he is not liable for repairs necessary at the commencement of

from the sale or value of the trees, he shall (*n*). Accordingly, in *Powell v. Rees* (*o*), it was held that an executor is liable to an action for money had and received by his testator, for coal tortiously taken by him from the plaintiff's land, if the testator had sold it, and received the money: And this although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. So Lord Chancellor Cowper held, in the case of *The Bishop of Winchester v. Knight* (*p*), that the lord of a manor might bring a bill for an account of ore dug, or timber cut by the defendant's testator: And his Lordship observed, that it would be a reproach to equity, to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy: And his Lordship further remarked that it was true, as to the trespass of breaking up meadow, or ancient pasture ground, it died with the person: but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it had been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it. So if a man commits equitable waste, and dies, as where tenant for life without impeachment of waste, and as such having a right at law to cut timber on the estate, and a property in the trees, abuses that power, by cutting ornamental trees, or trees not ripe for cutting, a Court of Equity has jurisdiction to make the personal representatives of the party, who has committed such waste, accountable for the produce of it (*q*). But a Court

his interest, or in respect of breaches of covenant which had arisen before the testator's death. The question again came before Kekewich, J., in *Re Gjerns*, [1899] 2 Ch. 54, and in deference to the opinion of Stirling, J., in *Re Redding*, [1897] 1 Ch. 876, the considered judgment of North, J., in *Re Betty*, and the opinion of the Vice-Chancellor of Ireland in *Kingham v. Kingham*, [1897] 1 I. R. 170, "that a tenant for life, whether legal or equitable, is within the maxim, *qui sentit commodum sentire debet et onus*," he decided that a tenant for life of leaseholds, specifically bequeathed by the Will of a testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself and the testator's estate, to pay the rent reserved by the lease, and perform the covenants and conditions contained in it. The estate of a tenant for life of leaseholds is not, however, liable to the *remainderman* for repairs made necessary by the non-fulfilment during the life tenancy of covenants to repair: *Re Parry and Hopkins*, [1900] 1 Ch. 160.

(*n*) *Hambly v. Trott*, 1 Cowp. 376, by Lord Mansfield.

(*o*) 7 A. & E. 426.

(*p*) 1 P. Wms. 406. See *Powell v. Aiken*, 4 K. & J. 352. *per* Wood, V.-C.

(*q*) *Lansdowne v. Lansdowne*, 1 Madd. 116.

of Equity will not direct an account, against the executor or administrator of tenant for life without impeachment of waste, of dilapidations permitted by him in and about the mansion-house (*r*).

Again, an action would not lie against the executor of a parishioner, by whom tithes were subtracted, to recover the treble value under the statute of Edward the Sixth, even although the testator were a lessee for years so that his estate came to his executor; for, being founded on a personal tort, it died with the person (*s*). But the executor would have been liable in another form of proceeding: for the tithes, when severed, belonged to the tithe-owner; and the case, therefore, fell within the principle that where property is acquired which benefits the testator, an action for the value of the property shall survive against the executor (*t*).

The liability under a bastardy order is purely personal, and if the father dies the mother cannot claim against his estate for arrears or for future payments (*u*). On the other hand the personal representative of the mother of a bastard child is not liable for necessities supplied to the child after her death (*v*).

The only cases outside the statute 3 & 4 Will. IV. c. 42, presently referred to, in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. The profits, arising from a wrong done by a deceased

Profits arising from a wrong done can be followed against the estate of the wrong-doer.

(*r*) *Lansdowne v. Lansdowne*, 1 J. & W. 522; *Re Cartwright*, 41 C. D. 532; *ante*, p. 1342, note (*m*).

(*s*) *Wentw. Off. Ex.* 254, 14th edit.; *Holl v. Bradford*, 1 Sid. 88; *Weekes v. Trussell*, 1 Sid. 181; *Moreton v. Hopkins*, 2 Keb. 502; *Com. Dig. Admon. (B.)* 15.

(*t*) By Lord Eldon, in *Pulteney v. Warren*, 6 Ves. 89, 90.

(*u*) *Re Harrington*, [1908] 2 Ch. 687.

(*v*) *Ruttinger v. Temple*, 4 Best & Sm. 491.

man, which can be followed against his estate, are only such profits as take the shape of property, or the proceeds on value of property, withdrawn from the rightful owner and acquired by the wrong-doer (x).

3 & 4 Will. IV.
c. 42:

actions may
be brought
against exe-
cutors for an
injury to
property real
or personal,
by the tes-
tator, com-
mitted six
months before
his death:
within what
time to be
brought.

By stat. 3 & 4 Will. IV. c. 42, s. 2, after reciting that there is no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy thereof it is enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death (y), and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

It was held in the case of *Powell v. Rees* (z), where coal had been tortiously taken from the plaintiff's land by an intestate,

(x) See the judgment of Bowen, L. J., and Cotton, L. J., in *Phillips v. Homfray*, 24 C. D. 439, in which case Baggallay, L. J., dissented from the other members of the Court, expressing his opinion thus: "The general result of these cases, and of others to the like effect, may be thus stated, that a Court of Equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the Court." *Ibid.* p. 476; and see *Re Swan*, [1915] 1 Ch. 829, *post*, p. 1351. In *Re Duncan*, [1899] 1 Ch. 387, it was held that, where there was nothing among the assets of the deceased that at law or in equity belonged to the claimant, and the damages which had been done to him were unliquidated and uncertain, the executors of the wrong-doer could not be sued merely because his estate might have benefited by the wrong complained of.

(y) Where the plaintiff brought his action for damages and an injunction against the firm of T. & Co. for fouling a stream which caused no benefit to the defendants, and the firm consisted of T. alone who died more than six months after the commencement of action, and the action was continued against his executors, it was held that, T. having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executors although the action had been commenced in the lifetime of the testator and although the executors continued the business in the name of the firm: *Kirk v. Todd*, 21 C. D. 484.

(z) 7 A. & E. 426, *ante*, p. 1344.

who had sold it and received the money, and part had been raised more than six months before his death, and part within six months, that the plaintiff might bring trespass, under this statute, against the administrator, for so much as was raised within the six months, and also money had and received for so much as was raised before (a); the acts being distinct, and therefore the two actions not incompatible.

In *Richmond v. Nicholson* (b), which was an action of trover for a watch against the defendant, as the executor of one Harriet Reeves, the declaration stated that Harriet Reeves died on March 27th, 1839, and alleged a conversion by her within six calendar months next before her decease: The defendant pleaded, that Harriet Reeves was not guilty within six calendar months before the time of her death: It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer, in September, 1837; that Spencer redelivered it to her in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor:" She died in March, 1839: And the Court of Common Pleas held, that this was sufficient evidence of a conversion within six months before her death.

In conclusion of this branch of the subject, it may be mentioned, that an action on the case lies, by the custom of England, as it is sometimes expressed, but to speak more correctly, by the common law, against the executors of a parson, vicar, or other ecclesiastical person, at the suit of his successor, for dilapidations of the houses or buildings upon his spiritual benefice (c). So an action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against the executor of his predecessor (d). The law is the same as to a perpetual curate (e). And such an action is maintainable where the hedges and fences belonging to the glebe are left in a state of decay, or where there has been a felling of timber growing thereon, otherwise than for repairs or fuel (f). But it will not lie

Liability of
executor of
incumbent,
&c., for
dilapidations.

(a) *Ante*, p. 1344.

(b) 8 Scott, 134.

(c) Wentw. Off. Ex. 255, 14th edit. And by stat. 13 Eliz. c. 10, s. 2, if any spiritual person fraudulently grants away his goods, &c., so as nothing be left to his executors, such grantee shall be liable to the successor's suit in any Court Ecclesiastical, as he might have been, if the grantee was executor of the grantor.

(d) *Radcliffe v. D'Oyly*, 2 T. R. 630, 637.

(e) *Mason v. Lambert*, 12 Q. B. 795.

(f) *Bird v. Relph*, 4 B. & Adol. 826, 830.

in respect of pulling down a building on the rectory and substituting another in a different part, unless the value of the estate be impaired, the burthens on it increased, or the evidence of title impaired (*g*). Moreover, neglect to cultivate the glebe land in a husbandlike manner is not a dilapidation for which the executors of an incumbent are liable (*h*). Nor will an action lie for digging gravel in the glebe (*i*). Formerly, indeed, it was doubted whether any action at law, or elsewhere than in the Spiritual Court, would lie for dilapidations, even by a succeeding rector, &c., against his predecessor who had vacated by cession or otherwise (*k*): but that point was determined in *Jones v. Hill*, 2 Will. & Mary (*l*): And the Temporal Courts having once taken cognizance of such matters, it would seem that the action was considered to lie against the executors of a deceased rector, &c., from the necessity of the thing; and such actions have not infrequently been brought (*m*). If the successor dies, without having enforced the right of action, it survives to his executor, who being himself liable to the third incumbent for the whole of the dilapidations existing at the death of his own testator, may recover from the executor of the first incumbent for so much of them as occurred during the first incumbency (*n*).

The reason for the liability of the executor or administrator for such dilapidations was thus stated by Lord Chief Justice Willes, in *Sollers v. Laurence* (*o*), "Because it is not considered as a tort in the testator, but as a duty which he ought to have performed; and therefore his representatives, so far as he left assets, shall be equally liable as himself: And, for this reason, it is not contrary to the rule, that *actio personalis* (which is always understood of a *tort*) *moritur cum personâ*." It is observable, however, that this action is in form an action on the case in *tort*; and that it could not possibly be framed in *assumpsit*, as on a contract; for the plaintiff must be the succeeding rector, &c.,

(*g*) *Huntley v. Russell*, 13 Q. B. 572. See further *S. C.*, as to what were acts of Waste, for which this action lies.

(*h*) *Bird v. Relph*, 4 B. & Adol. 826.

(*i*) *Ross v. Adcock*, L. R. 3 C. P. 655.

(*k*) See the observation of Buller, J., in *Radcliffe v. D'Oyly*, 2 T. R. 637. It is said in *Wentw. Off. Ex.* p. 255, 14th edit. that the executors are liable, *by the spiritual or ecclesiastical law*.

(*l*) 3 Lev. 268.

(*m*) See the judgment of Buller, J., in *Radcliffe v. D'Oyly*, *ubi supra*.

(*n*) *Bunbury v. Hewson*, 3 Exch. 558.

(*o*) Willes, 421.

who cannot be known until after the death of the predecessor, and of course could not contract with him: It is clearly an exception to the general rule that no action will lie against an executor to which his testator was not liable, for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ*; an action cannot be said to die, which never had nor could have had existence. It seems, therefore, not to be quite correctly stated, that "the executor shall be equally liable as the testator."

The liability of the representatives of a deceased incumbent to answer for dilapidations is now governed by stat. 34 & 35 Vict. c. 43 [Ecclesiastical Dilapidations Act, 1871]. By this Act the bishop within three calendar months directs the diocesan surveyor to inspect the premises and report what sum, if any, is required to make good the dilapidations (*p*) (sect. 29). The surveyor sends a copy of his report to the bishop, new incumbent and the representatives of the late incumbent (sect. 30), to which report opportunity to object is given (sects. 32—33). The bishop makes an order stating the repairs and their cost, for which such representatives are liable, and a copy of such order is delivered to them (sects. 34 and 35). The sum stated in the order as to the cost of repairs is a debt due from the representatives of the late incumbent and is recoverable in law or in equity (*p*) (sect. 36). No sum is recoverable for dilapidations in respect of any benefice unless the claim for such sum is founded on an order made under the provisions of the Act (sect. 53).

34 & 35 Vict.
c. 43 (Eccle-
siastical
Dilapidations
Act, 1871).

An allotment made to a vicar in lieu of tithes, under an Inclosure Act, is subject to the law and custom of England, as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable at the suit of his successor (*q*).

It may be convenient to investigate, in this place, the *extent* to which the executor or administrator of a rector, &c., is liable

Extent to
which ex-
ecutor of
administrator

(*p*) The sum stated in the bishop's order as the cost of repairs is, under sect. 36, a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors: *Re Monk*, 35 C. D. 583. See *ante*, p. 788.

(*q*) *Bira v. Relph*, 2 Adol. & Ell. 773; 1 Nev. & M. 415.

of rector is
liable for
dilapidations.

for dilapidations. In *Percival v. Cooke* (*r*), Best, C. J., expressed an opinion at *nisi prius*, that the representatives of a prior incumbent are only liable for such repairs as an outgoing tenant would be bound to perform, and not for complete and finished repairs (*s*). In *Wise v. Metcalfe* (*t*), the subject was fully considered by the Court of King's Bench: and the Judges of that Court were of opinion that the incumbent is bound to maintain the parsonage (which must be assumed to be suitable in point of size, and other respects, to the benefice) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement (*u*); and that he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong: And that on this principle the damages must be calculated in an action for dilapidations against the executor or administrator of a deceased rector by the successor.

The successor may have separate actions against the executor or administrator of the late rector, for dilapidations to different parts of the rectory (*v*).

Liability of
executor for
breaches of
trust by
testator.

It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not (*x*). So

(*r*) 2 Car. & P. 460.

(*s*) And his Lordship in that case expressed his further opinion, that the executors were entitled to be allowed, in such estimate, for timber which the late incumbent might have cut and used in such repairs, and which his successor had used for that purpose. See also as to stone and timber, which could be got from the glebe: *Bunbury v. Hewson*, 3 Exch. 558.

(*t*) 10 B. & C. 299.

(*u*) In *North v. Baker*, 3 Phillim. 309, Sir John Nicholl intimates that, in some cases, the thorough repair of old building is not all to fall on one incumbent. As to when the incumbent may remove hot-houses, see *Martin v. Roe*, 7 E. & B. 237.

(*v*) *Young v. Munby*, 4 M. & S. 183.

(*x*) *Adair v. Shaw*, 1 Sch. & Lef. 272; *Montford v. Cadogan*, 17 Ves. 489; *Walsham v. Stainton*, 1 De G. J. & S. 678; 1 H. & M. 322. In *Ramskill v. Edwards*, 31 C. D. 100, directors were held liable for breach of trust in advancing money of the company upon an unauthorised security. A defendant died after the commencement of the action, and it was held that the liability to contribute survived against his estate: *Shepherd v. Bray*, [1906] 2 Ch. 235. If a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is liable, though if redress had been sought

where a tenant for life of chattels lost or injured them it was held that she was in the position of trustee for the remainderman, who was therefore entitled to recover from her executor the amount necessary to replace or restore the chattels (y).

It may here be observed, that if an action is brought against an administrator for a breach of a covenant made by the deceased, it cannot be pleaded in bar that the defendant took out administration at the request of the plaintiff, and on his promise, *not under seal*, that he would not charge, or seek to charge, the defendant as administrator or otherwise with any breaches of the covenant in question (z).

It is no bar to an action against an administrator on a covenant made by the deceased that the defendant took out administration on a parol promise of the plaintiff that he would not sue.

SECTION II.

Particular instances where the Executor or Administrator is liable with respect to the Acts of the Deceased.

In the preceding section, it has been attempted to collect the principal cases illustrative of the general principle as to the liability of executors and administrators with respect to claims which might be enforced against the deceased himself, if he were living: It remains to advert to some particular instances in which such liability has been established.

in respect of that breach of trust it was reparable in his lifetime. And this is true as well in the case of wilful default as of an active breach of trust: *Devaynes v. Robinson*, 24 Beav. 86, 95. A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. P., one of these executors, died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors being placed on the list of contributories, paid a large sum out of the estate for calls. A bill was filed against the surviving executors and the executors of P. to make them liable for the loss. P.'s executors did not answer, nor did they in evidence give any reason why conversion had not taken place within a year from the testator's decease; and it was held (affirming *Stuart, V.-C.*), that P.'s estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within a year; and that as P.'s executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject: *Grayburn v. Clarkson*, L. R. 3 Ch. 605.

(y) *Re Swan*, [1915] 1 Ch. 829.

(z) *Harris v. Goodwyn*, 2 M. & Gr. 405. Perhaps the defendant might have been relieved by application to the Court to restrain the action: *Per Tindal, C. J.*, *ibid.* 418. Since the Judicature Act, 1873 (s. 24 (5)), any such relief must be sought by raising any equity as a defence in the action.

Debts of
record:

First, as to debts of record. The executor or administrator is bound, as far as he has assets, to satisfy all judgments recovered against the testator or intestate, without regard to the circumstance whether a judgment was founded on a cause of action which would not have survived his death: Thus, although the executor of a sheriff is not liable to be sued for an escape permitted by his testator (*a*), yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment (*b*).

Statutes
and recog-
nizances:

An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased (*c*); and upon all the inferior debts of record of the deceased, as fines imposed by the Justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like (*d*).

Liability of
executor on
joint contracts
of testator:

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (*e*): And if all the parties are dead, the executor of the survivor is alone liable: Thus, if two retain an attorney, and both die, the executor or administrator of the survivor only shall be charged, and not the executors of both: for a personal contract survives of both parties; otherwise of real contracts, as warranty: and therefore, where, in an action

(*a*) See *ante*, p. 1339.

(*b*) *Whitacres v. Onsley*, Dyer, 322, a. b.

(*c*) It seems to have been once doubted whether the executor of the consor of a statute merchant was liable: See Wentw. Off. Ex. c. 11, p. 243, 14th edit.

(*d*) Wentw. Off. Ex. c. 11, p. 240; but see Anon. Cro. Jac. 219.

(*e*) *Godson v. Good*, 2 Marsh. 300, by Gibbs, Ch. J. S. C. 6 Tannt. 594. No particular words are necessary to constitute a covenant of either kind (that is to say, either joint or several). If two covenant generally for themselves without any words of severance, or that they or one of them shall do such a thing, a joint charge is created: *White v. Tyndall*, 13 A. C. 263, 269; *Levy v. Sale*, 37 L. T. 709; *Clarke v. Bickers*, 14 Sim. 639. And this is so even though the covenant be contained in a demise to two as tenants in common: *White v. Tyndall*, *ubi supra*. But where, in an agreement for the sale of letters patent, it was agreed that the assignment should contain a covenant by the vendors that all the letters patent were valid, and in nowise void or voidable, it was held by the Court of Appeal that the assignment should contain joint and several covenants by the vendors that the letters patent were valid and in nowise void or voidable, and that, one of the vendors having died, the relief against his personal representative was rightly claimed on that footing: *National Society, &c. v. Gibbs*, [1900] 2 Ch. 280. As to whether the interest in a joint contract passes to the executor, see *post*, Pt. v. Bk. I. Ch. I.

against the executors of both, they pleaded jointly, and judgment was given for the attorney, it was stayed on motion, because the executor of the survivor only was chargeable, notwithstanding the pleading and admission of the parties (*f*).

So in debt upon bond, it appeared upon oyer that A., B., and C. were bound jointly, and that A. was dead; whereas the action was brought against his executor and the other two: Upon demurrer, the Court were of opinion, that the action was not well brought: for by the death of one of the obligors, his executor is wholly discharged (*g*).

If a testator being a *sole* defendant dies *before* judgment by Ord. XVII. r. 1 (R. S. C. 1883), if the cause of action survive or continue, that is to say, if it does not fall within the rule *actio personalis moritur cum personâ*, the action shall not abate, but the plaintiff may, under Rule 4 of the same order, obtain an order that the personal representative of the deceased be added as a party. This order, it seems, may be obtained *ex parte*. Further, by Ord. XVII. r. 1, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death (*h*).

Where testator a sole defendant dies before judgment.

If a testator, *sole* defendant, die *after* judgment, then by the common law the plaintiff could issue execution against the goods of the testator without any order, if the judgment were recovered within a year before his death (*i*). But now, by Ord. XLII. r. 23, if any change has taken place by death in the parties liable to execution, leave must be obtained to issue execution (*k*) against the goods of the testator. This order must, it would seem, be obtained on notice to the executor (*l*).

Where testator a sole defendant dies between the verdict or finding of the issues of fact and the judgment.

Where testator a sole defendant dies after judgment

(*f*) *Hamond v. Jeithre*, 2 Brownl. & Gold. 99. See also *Calder v. Rutherford*, 2 Brod. & Bing. 302; *Slater v. Wheeler*, 9 Sim. 156.

(*g*) *Osborne v. Crosbern*, 1 Sid. 238. See also *Towers v. Moor*, 2 Vern. 99; *Richardson v. Horton*, 6 Beav. 185.

(*h*) See *post*, p. 1355.

(*i*) *Wheatley v. Lane*, 1 Saund. 285.

(*k*) Equitable execution is not "execution" within the meaning of this rule. What is commonly called equitable execution is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the Court. Assuming, therefore, that execution at law can be issued against the estate of a deceased person without

(*l*) *Re Shephard*, 43 C. D. 131; see *Thompson v. Gill*, [1903] 1 K. B. 760.

An order giving leave to issue execution is not equivalent to a judgment against the executor. It dispenses with the necessity of a judgment against him, and enables the person alleging himself to be entitled to execution to issue execution against the executor without it. Consequently such an order does not satisfy the requirements of sub-sects. 14 and 15 of 1 & 2 Vict. c. 110, so as to enable a charging order to be made against the executor of a deceased judgment debtor, but the creditor must bring an administration action (*m*).

Where one of several defendants dies before judgment.

If one of *several* defendants on a joint cause of action die *before* judgment, then it would seem that in a personal action the estate of the dead man is discharged from liability (*n*), for if two enter into a joint bond, and one die at any time before judgment, the survivor shall be charged alone (*o*). And if one of two defendants dies after judgment, and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone (*p*): So a release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor (*q*).

Where one of several defendants dies after judgment.

And if one of *several* defendants on a joint cause of action die *after* judgment, it would seem that Ord. XLII. r. 23 (R. S. C. 1883), will not, except as against the land of the deceased (*r*), apply, because, as we have seen, if one of two

any leave of the Court (as to which *quære*) a receiver by way of equitable execution cannot be appointed of the estate in the absence of the persons on whom the estate has devolved: *Norburn v. Norburn*, [1894] 1 Q. B. 448. Ord. XVII. r. 1, does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action: *Re Shephard*, 43 C. D. 131.

(*m*) *Stewart v. Rhodes*, [1900] 1 Ch. 386, and see *ante*, p. 662, n. (*m*).

(*n*) By sect. 136 of the Common Law Procedure Act, 1852, it was enacted that: "If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." And now it would seem that in such a case the action would by virtue of Ord. XVII. r. 1, proceed as against the defendant on whom the whole liability had devolved by survivorship without the necessity of obtaining any order.

(*o*) *Lampton v. Collingwood*, 4 Mod. 315.

(*p*) If he takes out execution upon the real lien, the charge must be equally against the survivor and the real representative of the deceased; for though a personal execution survives, a real does not: *Sir W. Herbert's Case*, 3 Co. 14, a; 2 Saund. 51, note (4) to *Trethewey v. Ackland*.

(*q*) *Ashbee v. Pidduck*, 1 M. & W. 564.

(*r*) If it is sought to have execution against the land of a deceased

defendants die after judgment and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone.

And in the same way, although it is provided by Ord. XVII. r. 1 (R. S. C. 1883), that whether the cause of action survive or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but that the judgment may in such a case be entered notwithstanding the death, so that if one of two or more defendants dies between verdict and judgment, judgment may be entered on taking the proper steps under Ord. XVII. r. 2 and r. 4, against the deceased defendant, even though the cause of action fall within the rule *actio personalis moritur cum personâ*, yet it would seem that, if the cause of action be joint, there is nothing in this Order to enable the action to continue against any other than the surviving defendant.

Where one of several defendants dies between verdict or finding of the issues and judgment.

If the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action(s): and, before the Judicature Acts, he could not be sued jointly with the survivor, because one is to be charged *de bonis testatoris* the other *de bonis propriis* (t). It has, however, been suggested, that the rule is different since the Judicature Acts (u). The following statement is to be found in Lindley on Partnership, 6th edit., at pp. 297, 298: "Before the Judicature Acts, when a partner died in the lifetime of any one or more of his co-partners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death,

judgment debtor on a joint cause of action, leave to issue an *elegit* must be obtained, it would seem, on notice to the heir. See Ord. XLII. r. 23.

(s) *May v. Woodward*, 1 Freem. 248. As to what words will constitute a joint and several bond, see *Tipping v. Coates*, 18 Beav. 401; *White v. Tyndall*, 13 A. C. 263. There is in the case of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors not only as against him, but as against all the rest. See *per Bowen, L. J.*, in *Re Hodgson*, 31 C. D. 177, 188. See also *Kendall v. Hamilton*, 4 A. C. 504; *McLeod v. Power*, [1898] 2 Ch. 295.

(t) *Hall v. Huffam*, 2 Lev. 228.

(u) See Lindley on Partnership, 6th edit. p. 297; *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504; and in this respect *Hall v. Huffam*, 2 Lev. 188 and 228, *alias Hall v. Rougham*. 3 Keble. 798, would seem to be no longer law.

must have been brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of such a contract. So an action for the conversion of partnership goods must have been brought by the surviving partners. It followed, from the above rule, that the last surviving partner, or if he was dead his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm. These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is purely joint in equity as well as at law. In other cases (*x*) an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner" (*y*).

No change has been made in the law which forbade the joinder of distinct claims by or against several persons, and which required each such separate claim to be made the subject of a separate action (*z*). Ord. XVI. and the rules under it do not alter the liabilities of defendants, and therefore no one defendant can now be made "jointly, severally, or in the alternative," liable for any damages to which he would not have been previously liable, and the only judgment which previously could have been recovered against joint wrongdoers was for the amount to which each and every defendant was liable with the others (*a*). But there are cases where the connecting link and common source of grievance have been held to justify the joinder of several defendants in what is regarded as in substance a single cause of action (*b*).

(*x*) As to which, see Partnership Act, 1890, sects. 9 and 12.

(*y*) In support of this last sentence reference is made to R. S. C. Ord. XVI. rr. 1, 4, 6, 8. Ord. XVI. r. 4, provides that, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

(*z*) *Smurthwaite v. Hannay*, [1894] A. C. 494; *Sadler v. Great Western Rail. Co.*, [1896] A. C. 450.

(*a*) *Per FitzGibbon, L. J.*, in *Dawson v. McClelland*, [1899] 2 I. R. 486, 498.

(*b*) *Frankenburg v. The Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, where it was contended for the executors of the deceased director that the cause of action against them was different from the causes of action against the other defendants, and that they were liable only to the extent to which their testator's estate had benefited by the fraud. But the Court of Appeal held that the substantial

In a joint action where joint liability is established the liability of the parties may be differentiated in point of time (c). This was the established Chancery practice. So in an action against partners for encroachment on a mine, the cause of action continuing, if one of the partners died, his estate would only be accountable for the actual profits received up to his death, while the liability of the surviving partners would be quite different, and might continue till a later date (d).

With regard to the liability in equity of the executor of the deceased joint contractor, it is completely settled that in the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executors is extinguished (inasmuch as a partnership contract is joint), yet they may be sued in equity (e). And after much contention it is now settled that the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner (f). Thus, in *Kendall v. Hamil-*

Liability in equity of executor of deceased joint contractor

cause of action was the issuing of the prospectus, and that there was no ground for striking out any of the defendants. See, further, the observations of Kenny, J., in *O'Keeffe v. Walsh*, [1903] 2 Ir. R. 681, 728.

(c) *O'Keeffe v. Walsh*, *ubi supra*.

(d) *Per* Gibson, J., *ibid.*, p. 717. Under Ord. XXXVI. r. 58, where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment. See *Jones v. Simes*, 43 C. D. 607.

(e) *Vulliamy v. Noble*, 3 Meriv. 619; *Winter v. Innes*, 4 My. & Cr. 109. See *Holme v. Hammond*, L. R. 7 Ex. 218. This rule is applicable to the case of the death of one of two executors carrying on their testator's trade, in that character, and in the ordinary course of the business accepting a bill of exchange describing themselves simply as executors of their testator: *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24, in which case the estate of the deceased executor was held liable. It is to be observed that in cases of joint contracts there is no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied: *per* Lord Blackburn, *Kendall v. Hamilton*, 4 A. C. 504, 545.

(f) *Devaynes v. Noble*, 1 Meriv. 530; *Wilkinson v. Henderson*, 1 M. & K. 582. The surviving partners are necessary parties to a creditor's suit against the assets of the deceased: *Hills v. McRae*, 9 Harc. 297. In *Brown v. Gordon*, 16 Beav. 310, Romilly, M. R., said, that the debt though gone at law, remains due in equity, because equity considers it to be unjust that where two or more persons are jointly liable, the death of one should throw the whole debt on the others, and exonerate his

ton (*g*), Cotton, L. J., in pronouncing the judgment of the Court, says: "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor."

Again, in *Re Hodgson* (*h*), it was held that a creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and the surviving partner, and that it makes no difference which remedy he pursues first.

Nor will the first creditor be precluded from resorting to the assets of the deceased partner by having in the first instance obtained judgment against the surviving partners (*i*).

Liability of
partners.

Now by sect. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided that:—"Every partner in a firm is liable

estate. In *Ridgway v. Clare*, 19 Beav. 111, the same learned judge took occasion to express his opinion as to the mode in which the Court administers assets in cases of this description as follows, viz.: Where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner:—If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share:—If both the deceased and surviving partners are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied:—If both parties die before administration takes place, the rule is the same. See also *Lodge v. Pritchard*, 4 Giff. 294; 1 De G. J. & S. 610. The Court of Chancery enforces the remedies against the estate of a deceased partner subject to two conditions. In the first place it requires that partnership debts shall be postponed to the separate debts, and that upon a very apparent ground; for it is obvious that inasmuch as the partnership debts are paid first from the partnership estate before anything can flow from the partnership estate to the separate estate of the deceased partner, it is not unreasonable by contrast that the partnership debts should be postponed to the separate debts. The second condition is that the Court requires the presence of the surviving partner in some method, shape or manner at the taking of the accounts of the partnership: *per* Fry, L. J., *Re Hodgson*, 31 C. D. 177, 192.

(*g*) 3 C. P. D. 403, 407. See *infra*, n. (*m*).

(*h*) 31 C. D. 177, *supra*.

(*i*) *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24; *Jacomb v. Harwood*, 2 Ves. Sen. 265.

jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts" (j).

The equitable remedy extends to every joint contract for a loan of money giving to the creditor the benefit of the security of several persons, without any distinction that the debt must be a mercantile debt incurred by joint traders: Thus, in *Thorpe v. Jackson* (k), where four persons had opened a joint account with certain bankers, who advanced them money on such joint account, Alderson, B., held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency (l).

Although this interposition of Courts of Equity with regard to partnership debts on the death of a member of a partnership has led to the expression that partnership debts in the eye of a Court of Equity are joint and several, this does not mean that a Court of Equity altered or changed a legal contract, but merely that the Court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on (m).

At one time there seems to have been a tendency in Courts of Equity to treat partnership debts as being joint and several irrespective of death and the necessity for the purpose of administration of excluding the doctrine of survivorship. Thus, Sir William Grant, after stating that it has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors, and that when the obligation exists only by virtue of the covenant the extent of the obligation can be measured only by the words in

(j) A limited partner is not liable beyond the amount contributed by him. See Limited Partnership Act, 1907, s. 4 (2).

(k) 2 Y. & Coll. 553.

(l) But see *Slater v. Wheeler*, 9 Sim. 157; *Other v. Iveson*, 3 Drew. 177, 181, 182.

(m) *Kendall v. Hamilton*, 4 A. C. 504, 517, per Lord Cairns, L. C.

which it is conceived, goes on to say that in the case of a partnership debt all the partners have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured (*n*).

Cases in which equity will treat a joint obligation as several.

But although a partnership liability will not generally be treated as joint and several in equity, apart from administration, yet there are cases in which a Court of Equity will treat a joint obligation as several, and the true doctrine on the subject of obtaining relief in equity by considering joint contracts as several, appears to be, that wherever a Court of Equity sees that in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in equity, been considered as several (*o*). Thus a joint bond has, in equity, been considered as several, where there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived; and a Court of Equity cannot give the instrument any other than its legal effect (*p*). Accordingly, where a joint promissory note, signed "J. and J. Ewing—James Parr, *surety*," was given to a creditor of the firm of John and James Ewing, and James Parr died, John and James Ewing being both alive, one of whom afterwards became bankrupt, and the other insolvent; it was held that the promissory note could not be considered as several, against James Parr the surety (*q*). So where A. and B. were obligors in a joint bond, and A., who was alleged to be the principal debtor, died; it was held that his assets were not, in equity, liable upon the bond, but that the liability survived to B. (*r*). Again, where premises had been demised to A. and

(*n*) *Sumner v. Powell*, 2 Meriv. 37; 1 Turn. & R. 423.

(*o*) *Primrose v. Bromley*, 1 Atk. 90; *Bishop v. Church*, 2 Ves. Sen. 100, 371; *Hoare v. Contencin*, 1 Bro. Ch. C. 27; *Thomas v. Frazer*, 3 Ves. 399; *Burn v. Burn*, 3 Ves. 573; *Ex parte Kendall*, 17 Ves. 525; *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24; and cf. *National Society, &c. v. Gibbs*, [1900] 2 Ch. 280.

(*p*) *Sumner v. Powell*, 2 Meriv. 30; *S. C.*, affirmed, 1 Turn. & R. 423; *Richardson v. Horton*, 6 Beav. 185; *Wilmer v. Currey*, 2 De G. & Sm. 347. See also *White v. Tyndall*, 13 A. C. 263.

(*q*) *Rawstone v. Parr*, 3 Russ. 424, 539; *Other v. Iveson*, 3 Drew. 177.

(*r*) *Richardson v. Orton*, 6 Beav. 185.

B., who were co-partners, upon which they carried on their partnership business, and A. died during the lease, and, after his death, his executors carried on the business in co-partnership with B. on the premises: it was held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered in equity as several as well as joint, so as to make A.'s estate liable for breaches of the covenant which occurred after his death (s). On the other hand, the Court of Appeal, in the case of *Beresford v. Browning* (t), construed a contract, relating to payment and indemnity to a retiring partner, which was joint in form, as several, on the ground that the circumstances under which the contract was entered into, showed that there was a joint and several liability independently of the contract, and, therefore, an intention that the continuing partners should be severally liable.

It being now settled, beyond dispute, that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors, a further question remains to be considered, viz., when and by what means that liability is to terminate. It seems clear that the deceased partner's estate must continue liable until the debts, which affected him at the time of his death, are, in some way, fully discharged (u). The discharge, however, may take place in various ways; not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt (x): Or there may be an equitable bar to the remedy; for as the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general

(s) *Clarke v. Bickers*, 14 Sim. 639. See also *White v. Tyndall*, *ubi supra*.

(t) 1 C. D. 30; cf. *Wilmer v. Currey*, 2 De G. & Sm. 347, where it was held on the facts that the deed imported a new liability.

(u) *Vulliamy v. Noble*, 3 Meriv. 619.

(x) *Thompson v. Percival*, 5 B. & Ad. 925; *Winter v. Innes*, 4 My. & Cr. 110; *Brown v. Gordon*, 16 Beav. 302. See also *Lee v. Flood*, 2 Sm. & G. 250; *Blair v. Bromley*, 5 Hare, 555, *per* Wigram, V.-C., *Lyth v. Ault*, 7 Exch. 669; *Bilborough v. Holmes*, 5 C. D. 255. As to discharge by proof, where there is no *locus pœnitentiæ*, against the estate of the continuing parties in bankruptcy, see *Scarfe v. Jardine*, 7 A. C. 345. See also *Simpson v. Henning*, L. R. 10 Q. B. 406, as to the effect of the receipt of a composition on the joint debt.

rules and principles, be entitled to the benefit of the demand (*y*). But the estate of the deceased partner is not discharged by the mere circumstance that the creditor, knowing of the death, continues his transactions with the surviving partners, and forbears for several years, at their request, to take any steps to enforce payment of his debt (*z*): nor by his receipt of interest from them and a new partner (*a*).

Right to
enforce con-
tribution.

With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion: although it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute rateably *inter se*, so as to bind the executors of a deceased co-contractor; yet if several persons jointly contract for a chattel, to be made or procured for the common benefit of all (for instance the building of a ship or the furnishing of a house), *and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying*; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished (*b*).

Provisions of
the Partner-
ship Act,
1890 (53 & 54
Vict. c. 39).

Dissolution by
death or bank-
ruptcy.

Besides the sections already cited the following sections of the Partnership Act, 1890 (53 & 54 Vict. c. 39), seem to be those which affect the duties and liabilities of executors:

Sect. 33 (1). "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner" (*c*).

(*y*) *Ex parte Kendall*, 17 Ves. 526, by Lord Eldon.

(*z*) *Winter v. Innes*, 4 My. & Cr. 101.

(*a*) *Harris v. Farwell*, 13 Beav. 403. By sect. 14 (2) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), it is provided that "Where after a partner's death, the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death." And see *Webster v. Webster*, 3 Swanst. 490. For other cases relating to these doctrines, see Lindley on Partnership, 6th edit. pp. 74, 621.

(*b*) *Prior v. Henbrow*, 8 M. & W. 873. See also *Batard v. Hawes*, 2 E. & B. 287, 298, where the Court seemed to think the executors liable without any special agreement.

(*c*) A limited partnership is not dissolved by the death or bankruptcy of a limited partner: 7 Edw. VII. c. 24.

Sect. 36 (3). "The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

Liability of estate of partner for partnership debts contracted after death of partner.

Sect. 39. "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

Rights of partners as to application of partnership property.

Sect. 42 (1). "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets."

Right of outgoing partner in certain cases to share profits made after dissolution.

(2). "Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

Sect. 43. "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

Retiring or deceased partner's share to be a debt.

Liabilities of
executors of
deceased
shareholders.

With respect to the liabilities of the executors of shareholders in public companies, it is important to notice the provisions of the Companies Act, 1908. The following are the chief sections of that Act which are material in this connection:—

Companies
Act, 1908.

Sect. 14 (2). "All moneys payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England and Ireland be in the nature of a specialty debt" (d).

Nature of
liability of
contributory.

Sect. 125. "The liability of a contributory shall create a debt (in England and Ireland) of the nature of a specialty, accruing due from him at the time when his liability commenced (e), but payable at the times when calls are made for enforcing such liability.

Contribu-
tories in case
of death.

Sect. 126. "If any contributory dies, either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees (f) shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability, and shall be contributories accordingly" (g).

Provision as
to representa-
tive contribu-
tories.

Sect. 163 (2). "In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others."

Sect. 126. "Where the personal representatives are placed on the list, the heirs or devisees need not be added, but, except in the case of heirs or devisees of any real estate in England, they may be added as and when the Court thinks fit."

(d) See *Buck v. Robson*, L. R. 10 Eq. 629; *Re Muggeridge*, *ibid.* 443.

(e) See *Re Muggeridge*, L. R. 10 Eq. 443.

(f) It follows that under 3 & 4 Will. IV. c. 104, the real estate of the deceased is chargeable with calls made as well after as before the deceased's death: *Turquand v. Kirby*, L. R. 4 Eq. 123; *Hamer's Devisees' Case*, 2 De G. M. & G. 366. There is no distinction between the dead shareholder's estate and the living shareholders' as to the extent and measure of liability: *Baird's Case*, L. R. 5 Ch. 725.

(g) Although the liability is *prima facie* a liability of the deceased's estate and not of his personal representatives personally, unless they have by their acts made themselves liable as shareholders; yet where executors paid a legacy without providing for any contingent liability in respect of shares which they retained unsold, and the company was subsequently wound up and the executors placed on the list of contributories, it was held that they were liable to pay the amount of the legacy in satisfaction of calls: *Taylor v. Taylor*, L. R. 10 Eq. 477. But there is no such liability where the distribution is made under the order of the Court: *Re King*, [1907] 1 Ch. 72. As to the right of the executors to be indemnified by the legatees, see *Jervis v. Wolferstan*, L. R. 18 Eq. 18; and *Whittaker v. Kershaw*, 45 C. D. 320.

Sect. 126. "If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of such deceased contributory or either of them, and of compelling payment thereof of the money due."

Provision in case of representative contributory not paying moneys ordered.

Unless by the Articles of Association the regulations of Table A. are excluded articles 21-23 relating to the transmission of shares on death and the liabilities thereon will apply (*h*).

Besides the liability of the estate of a deceased shareholder in respect of shares, the executor or administrator may make himself personally liable in respect of the same. An executor whose testator has held shares in a joint-stock company has generally one of two courses open to him. He may have the shares transferred into his own name, without any statement that he holds the shares in a representative capacity (*i*), and become to all intents and purposes a member of the company (*j*). He may, on the other hand, not wish to have the shares transferred into his own name, and he ought in that case to have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer of them (*k*).

Personal liability of executor besides liability of the estate.

It is quite open to an executor, as appears from Lord Selborne's language in *Buchan's Case* (*l*), to notify simply to the company, in which the testator was a shareholder, that he is the executor, and that alone would not authorize the company to put the name of the executor upon the register of shareholders in such a way as to make him personally liable: But where,

(*h*) The death of a shareholder makes not the slightest difference either in right or liability; the executor of a deceased shareholder who succeeds in point of property takes it (of course in his character as executor) on exactly the same terms and conditions as every other owner of the share, with equal benefits and equal liability. The dead shareholder remains, that is, his estate remains, a member of the association: *Baird's Case*, L. R. 5 Ch. 725. "Member," in sect. 192, includes the representatives of a deceased member, though not registered as members: *Llewellyn v. Kasintoe Estates*, 84 L. J. Ch. 70. As to executors' right to vote at meetings, see *Marks v. Financial News*, [1919] W. N. 237; and as to their being qualified to be directors, see *Grundy v. Briggs*, [1910] 1 Ch. 444.

(*i*) *Re Saunders & Co.*, [1908] 1 Ch. 415.

(*j*) In *Spence's Case*, 17 Beav. 203, it was held that executors, who, after the death of their testator, had purchased further shares, were contributories without qualification in respect of them, though they had been treated as executors in regard to such further shares. See also *Re Leeds Banking Co.*, L. R. 1 Ch. 231; *Jackson v. Turquand*, L. R. 4 H. L. 305.

(*k*) *Buchan's Case*, 4 A. C. 549, 588, *per* Lord Cairns, L. C.

(*l*) 4 A. C. 549.

upon the amalgamation of two banking companies, a shareholder had the option of exchanging his shares in the one bank for shares in the other, which was taking over the business of the former, and did not exercise the option but his executors did, and a certificate was made out to them individually but describing them as executors, they were held liable although the bank subsequently at their request cancelled the certificate in their names and made out one in the name of the testator. For if shares are once put into the names of executors individually, although offered to and accepted by them in a representative capacity, they cannot say that their liability is to be only a liability to the extent of the assets of the testator (*m*).

The case of trustees who take a transfer of shares in their names differs, in principle, from that of executors, who merely intimate their title as executors to a company, in order to claim and exercise the rights which belong to them as the legal representatives of their testator. Trustees have not, in any proper sense of the word, a representative character, but executors have; and it is impossible that they should not be entitled to produce legal evidence of their representative rights to the company, for the purpose of having their title in some way recorded and recognized, without making themselves personally liable (*n*).

Sect. 27 of the Companies (Consolidation) Act, 1908, which provides that no notice of any trust shall be entered on the register, does not protect a company which in the face of notice that a shareholder is not the beneficial owner makes advances or gives credit to him (*o*).

Companies
Clauses Con-
solidation
Act, 1845
(8 Vict. c. 16).

The Companies Clauses Consolidation Act, 1845, contains different provisions from those of the Companies Act, 1862, with regard to the procedure in the case of the decease of a shareholder in a company governed by the former Act. Upon sect. 18, the secretary, on receipt of the declaration required by that section, is obliged to enter in the register the name of the

(*m*) *Re Cheshire Banking Co., Duff's Executors' Case*, 32 C. D. 301.

(*n*) *Buchan's Case*, 4 A. C. 549, 595, *per* Lord Selborne; but see the observations of Lord Esher, M. R., in *Barton v. London & North-Western Rail. Co.*, *ubi supra*, as to the meaning of Lord Selborne being restricted to recording the title of the executors with a view to registering a purchaser from them of the shares, without being registered as shareholders themselves.

(*o*) *Mackereth v. Wigan Coal Co.*, [1916] 2 Ch. 293.

person entitled by transmission to the shares of the deceased member. When an executor finds that his testator has died entitled to shares in such a company, he may do one of two things. He may leave the shares alone outstanding in the name of the testator: the consequence would be that he could neither transfer the shares, nor vote in respect of them, nor receive dividends on them, and, though he might be liable for calls, it would only be in his representative capacity. On the other hand, the executor may want to deal with the shares, or to receive dividends in respect of them. If so, he must avail himself of the machinery given by the 18th section, and procure himself to be registered as a shareholder. Once registered under it, executors clearly become shareholders, the company having nothing to do with the character in which they hold the shares, whether as executors or trustees (*p*).

The liability of an executor, so long as he has not himself become a shareholder, is limited to the extent of the assets in his hands properly administered. If, however, he is guilty of a *devastavit*, he will be held liable to the extent of the *devastavit* to pay moneys due either before or after the death of the testator on the shares of the testator still standing in the testator's name (*q*).

There is no obligation on executors of a debenture holder to register the probate with the company as soon as they obtain it, and delay in registration beyond the date fixed for payment off does not disentitle them to interest (*r*).

In every case, where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator (*s*); that is, unless it is such a covenant as was to be performed by the person of the testator (*t*). Thus, in *Thursden v. Warthen* (*u*), a lord of a manor covenanted for himself, his heirs, and executors, within seven years to convey, upon request, a copyhold to the plaintiff

Covenants
concerning
the realty.

(*p*) *Per* Lindley, L. J., in *Barton v. London & North-Western Rail. Co.*, 24 C. D. 77, 88. Under sect. 27 of the Act of 1908, the company is not bound to regard trusts; but see *supra*.

(*q*) *Taylor v. Taylor*, L. R. 10 Eq. 477. As to the liability of an executor where a release given to a testator by a company had been set aside, see *Re Bewley*, 24 L. T. 177; 19 W. R. 464.

(*r*) *Fowler v. Midland Electric Corp.*, [1917] 1 Ch. 656.

(*s*) Bro. Covenant, pl. 12; Com. Dig. Covenant (C. 1).

(*t*) *Hyde v. Dean of Windsor*, Cro. Eliz. 553; *Bally v. Wells*, 3 Wils. 29.

(*u*) 2 Bulstr. 158.

for life, *secundum consuetudinem manerii*: The covenantor died, and the plaintiff requested his executor to convey the copyhold, which he refused; and thereupon, the plaintiff brought an action of covenant against the executor: It was objected, that the declaration did not show what estate the covenantor had in the manor, and therefore it should be intended to be a fee-simple, and if so, then the request ought to have been made to him who was to make the estate, and this was the heir; for the executor could not possibly perform the covenant, and so no breach by him: But Coke, C. J., said, that the request made to the executor was good; because executors represent the person of the testator as to the performance of covenants to be in covenant performed: And to this the whole Court (except Houghton, J.) agreed; and judgment was given for the plaintiff.

So in the case of *Macartney v. Blundell* (x), in Dom. Proc., the appellant claimed the renewal of a lease, pursuant to a covenant, against the heirs of the covenantor: They refused, alleging that the covenantor was bare tenant for life: And it was holden, that this refusal was a breach of the covenant, for which an action could be maintained at law against his representatives.

The executor is not only liable upon all covenants by the testator which have been broken in his lifetime (y), but, moreover, he is answerable for all breaches in his own time, as far as he has assets: For the privity of contract of the testator is not determined by his death (z). Thus, if a tenant in tail leases for years, and dies, and the issue in tails ousts the termor, he shall have covenanted against the executors, upon an express covenant for quiet enjoyment (a).

Restrictive
covenants.

The benefit of restrictive covenants annexed to land passes to the assign of the covenantee, and an executor, being an assign in law, can enforce such covenants though the benefit of them may not be so definitely attached to the land as to pass by a mere conveyance (b).

Liability of
executor of
landlord and
tenant:

Although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term

(x) 2 Ridgw. P. C. 113.

(y) Wentw. Off. Ex. 251, 14th edit.

(z) *Coghill v. Freelove*, 3 Mod. 326.

(a) F. N. B. 145 (E.), note (a). As to powers now of tenant in tail to lease, see Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 58).

(b) *Ives v. Brown*, 88 L. J. Ch. 373, ante, p. 607, n. (i).

liable for a breach of it after the assignment, yet this will not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although in covenant: the lessor shall have accepted the assignee as his tenant.

So the assignee of the reversion, by virtue of the stat. 32 Hen. VIII. c. 34, may maintain an action of covenant against the executor of the lessee upon an express covenant (c).

So if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant: And so also may the assignee of the reversion (d).

Hence an executor, when he carries a lease to market, has a right to require that the purchaser shall covenant for indemnity against the payment of rent and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for the title, but only that he has done no act to incumber (e).

(c) *Brett v. Cumberland*, Cro. Jac. 521, 522; 1 Saund. 241, a, note (5), to *Thursby v. Plant*. But although the executor of the original lessee will be liable for breaches of covenant, incurred after an assignment by the testator or by himself, it is otherwise where the testator was the assignee of the lease; for no action will lie against him except in respect of breaches in his own time: and therefore, all future liability may be discharged by assignment over, even to a pauper: *Taylor v. Shum*, 1 B. & P. 21. And since such a course is quite justifiable, morally as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to adopt it: *Rowley v. Adams*, 4 My. & Cr. 534; and see *Whitehead v. Palmer*, [1908] 1 K. B. 151.

(d) *Hellier v. Casbard*, 1 Sid. 266; *Coghill v. Freelove*, 3 Mod. 325. But see stat. 22 & 23 Vict. c. 35, s. 27, ante, p. 1079, by which an executor or administrator liable to a covenant in a lease or agreement for a lease granted or assigned to the testator or intestate, after satisfying all liabilities already accrued due, and setting apart a sufficient fund to answer any future claims that may be made in respect of any fixed or ascertained sum covenanted by the lessee to be laid out on the property, may assign the lease to a purchaser and distribute the residuary personal estate of the deceased without appropriating any part to meet any future liability under the lease. When the executor has done this he has freed himself from all personal liability in respect of any subsequent claim. This is, however, without prejudice to the lessor's right to follow the assets of the deceased.

(e) *Staines v. Morris*, 1 Ves. & B. 8; *Wilkins v. Fry*, 1 Meriv. 265, 266. Even if there be no such covenant, yet, if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after the assignment, the executor may have an action on the case, or *assumpsit*, against the assignee for having neglected to perform the covenant, whereby the executor sustained damage: *Burnett v. Lynch*, 5 B. & C. 589; *Marzetti v. Williams*, 1 B. & Ad. 424, by Lord Tenterden; *Moule v. Garrett*, L. R. 5 Exch. 132; affd. in Exch. Ch. L. R. 7 Exch. 101. But this liability in the assignee continues no longer than

It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant *in law*: For no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator. Accordingly, in the case of *Adams v. Gibney* (f), a tenant for life, remainder over, demised to the lessee, his executors, &c., for the term of fifteen years, *without any express covenant for quiet enjoyment*: The lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the fifteen years: And the Court of Common Pleas held, that the lessee could not maintain an action of covenant against the executor of the tenant for life, in respect of such eviction, although it was admitted that the word "demise" in the lease imported and made a covenant *in law* for quiet enjoyment by the lessee during the continuance of the estate out of which the lease was granted.

With regard to leases made after the 31st day of December, 1881, the Conveyancing Act, 1881, provides as follows:—

Sect. 10 (1). "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Sect. 11 (1). "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease,

his interest as such: *Wolveridge v. Steward*, 1 Cr. & M. 644; *Humble v. Langston*, 7 M. & W. 530; *Rowley v. Adams*, 4 My. & Cr. 540; though, perhaps, the executor has the same remedy against each subsequent assignee in respect of the breaches committed during the continuance of the interest of each: *Wolveridge v. Steward*, 1 Cr. & M. 660. As to the construction of the covenant entered into by the assignee of leaseholds, see *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173.

(f) 6 Bing. 656. See also *Williams v. Burrell*, 1 C. B. 402, as to what shall constitute an implied or an express covenant within the meaning of this rule.

be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

With respect to the liability of the executor of the lessee to in debt: an action of *debt* for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant, notwithstanding the lessee assigned the term before his death, or the executor has done so since (*g*). But if the lessor has *accepted the assignee as his tenant*, then no action of debt will lie against the executor for rent accrued since the assignment, although, as it just appeared, an action of covenant may be maintained on an express covenant for its payment during the continuance of the lease.

This may be the proper place to consider more fully a subject which has been already partially discussed (*h*), viz., the personal responsibility of the executor for the rent incurred under a demise to his testator (*i*). personal liability of executor for rent accrued after testator's death.

If the whole rent accrued in the lifetime of the testator, the

(*g*) It is true that Lord Coke, in *Walker's Case*, 3 Co. 24, *a*, says, that "it was adjudged in *Overton v. Sydhall*, that if the executor of a lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined." But this is contrary to all the subsequent authorities. See *Coghill v. Freelove*, 3 Mod. 325; *Pitcher v. Tovey*, 4 Mod. 76; 1 Saund. 241, *b*, note (5).

(*h*) *Ante*, p. 1333. It has been thought better to leave the discussion in the following pages as it appeared in the earlier Editions unaltered except by the addition of new cases, notwithstanding the constant reference to ancient pleading. It seemed impossible to adapt the text to the system of pleading since the Judicature Act without diminishing the authority which the text derives from Sir Edward Vaughan Williams.

(*i*) As to the protection afforded to an executor by an order for the administration of the testator's estate, see *Minford v. Carse*, [1912] 2 Ir. R. 245, C. A.

action to recover it from the executor must be brought against him in his representative character: and therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet*; and the judgment must be *de bonis testatoris* (k).

But in an action of debt for rent incurred after the death of the lessee, if the executor enters upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits (l). Therefore, if the action be brought in debt, the lessor may either sue the defendant as executor in the *detinet* (m), or in the *debet* and *detinet* (n), as assignee of the term (o). So, in covenant, the lessor has his election, either to charge the executor as executor (p), or as assignee, without naming him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the defendant (q).

(k) 1 Roll. Abr. 603 (S), pl. 9; *Fruen v. Porter*, 1 Sid. 379.

(l) *Boulton v. Canon*, 1 Freem. 337; *S. C.*, Pollexf. 125; 1 Saund. 1, note (1) to *Jevens v. Harridge*.

(m) *Royston v. Cordrye*, Aleyn, 42; *Hope v. Bague*, 3 East, 2.

(n) *Hargrave's Case*, 5 Co. 31; *Rich v. Frank*, Cro. Jac. 238; *Caly v. Joslin*, Aleyn, 34; 1 Saund. 1, note (1). So if the executor enters, he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died: *The Bailiffs of Ipswich v. Martin*, Cro. Jac. 411; *Jevens v. Harridge*, 1 Saund. 1. Formerly, if one sum of money was due for arrears of rent which became due in the lifetime of the testator, and another sum for arrears due in the executor's own time, the lessor could not in one action charge the executor in the *detinet* for the one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary: *Salter v. Codbold*, 3 Lev. 74; but one action might be brought for both sums in the *detinet* only: *Aylmer v. Hide*, 13 Geo. II.; B. R. M. S. Selw. N. P. 610, 6th edit. But now, under Ord. XVIII. r. 5, "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." See *post*, Pt. v. Bk. II. Ch. I.

(o) In such cases it appears to have been the practice to name the defendant executor, and to state in the declaration, in the *debet* and *detinet*, the demise to the deceased, his death, the grant of administration to the defendant, his entry into the demised premises, and the subsequent accruing of rent; see the entry in *Jevens v. Harridge*, 1 Saund. 1, and the case of *Caly v. Joslin*, Aleyn, 34. But it is sufficient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor. See *Lyddall v. Dunlapp*, 1 Wils. 4, 5; *Wollaston v. Hakewill*, 3 M. & Gr. 297; *infra*, note (r).

(p) *Buckley v. Pirk*, 1 Salk. 317.

(q) *Tilney v. Norris*, 1 Ld. Raym. 553; *S. C.*, 1 Salk. 309; Carth. 519; *Buckley v. Pirk*, 1 Salk. 317; 1 Saund. 1, note (1).

If the executor does not enter (*r*), he is still chargeable as executor in the *detinet*, because he cannot so waive the term as not to be liable for the rent as far as he has assets (*s*).

Where the executor, having entered, is sued in the *debet* and *detinet*, as assignee, for rent incurred after his entry, he cannot plead *plene administravit* (*t*), even although he be named exe-

(*r*) Before entry and taking possession, the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession he may be made liable as assignee; yet he may then by proper pleading limit his liability for rent to the yearly value the premises might have yielded, though it would seem he cannot so limit his liability in respect of breach of contract to repair: *Rendall v. Andrew*, 61 L. J. Q. B. 630, 633; *Whitehead v. Palmer*, [1908] 1 K. B. 151; *Minford v. Carse*, [1912] 2 Ir. R. 245. In *Rendall v. Andrew*, Mr. Justice A. L. Smith adopted the view indicated by Sir Edward Vaughan Williams in the earlier Editions of this Work, in which the note on this point ran as follows: There seems to be some doubt whether this distinction as to the entry of the executor has not, in a great measure, ceased to exist since the decision of *Williams v. Bosanquet*, 1 Brod. & B. 238. That case decided (overruling *Eaton v. Jacques*, Dougl. 455), that the assignee, in fact, of a lease may be charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied or actually become possessed. And it does not appear altogether clear whether it is not a consequence that an executor may likewise be charged, as assignee in law, without entry. See the observation of Parke, B., at the conclusion of his judgment in *Nation v. Tozer*, 1 Crompt. M. & R. 176; 4 Tyrwh. 565. The point above suggested was much discussed in the C. P., in the case of *Wollaston v. Hakewill*, 3 M. & Gr. 297; *S. C.*, 3 Scott, N. R. 593. In that case Tindal, C. J., in delivering the judgment of the Court, said that, as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is that he may, by proper pleading, discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor by alleging that the term is of no value, and that he has no assets. But that, if instead of relieving himself by pleading, he takes issue on the fact, whether he is assignee or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment. And his Lordship referred to the case of *Green v. Lord Listowell*, 2 Ir. L. R. 384, as having determined this precise point. See also *Ackland v. Pring*, 2 M. & Gr. 937. And as to an executor *de son tort*, see *Paul v. Simpson*, 9 Q. B. 365. This subject was again considered in the case of *Kearsley v. Oxley*, 2 Hurl. & C. 896. In that case the declaration charged the defendant as assignee of a lease, and alleged the non-payment of rent. The defendant pleaded that administration *de bonis non* of the lessee was granted to a woman whom he afterwards married, and that neither he nor his wife ever entered into or took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appeared. And it was held that this plea afforded a good answer to the action as an argumentative traverse that the defendant was assignee.

(*s*) *Howse v. Webster*, Yelv. 103; *Helier v. Casbert*, 1 Lev. 127.

(*t*) *Caly v. Joslin*, Aleyn. 34; *Helier v. Casbert*, 1 Lev. 127, 128; *Sackvill v. Evans*, Freem. 171; *Buckley v. Pirk*, 1 Salk. 317.

executor in the declaration (*u*): for if the rent be of less value than the land, as the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and therefore the plea of *plene administravit* confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered (*x*). And if judgment be given against the executor, it is *de bonis propriis* (*y*). But if the land be of less value than the rent, the executor may plead the special matter, viz., that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only (*z*). If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar unless it shows that there were no profits at all; because the executor is chargeable personally for so much of the rent as the premises are worth: If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed and the plea pleaded to the remainder (*a*). In

(*u*) See *ante*, p. 1372, note (*n*).

(*x*) *Buckley v. Pirk*, 1 Salk. 317.

(*y*) Wentw. Off. Ex. 285, 286, 14th edit.; 1 Saund. 1, note (1). So if the executor be sued in *assumpsit* for use and occupation in his own time, he shall be liable *de bonis propriis*, though it be laid that the defendant occupied as executor: *Wigley v. Ashton*, 3 B. & A. 101. See *Atkins v. Humphrey*, 2 C. B. 654.

(*z*) *Billinghurst v. Spearman*, 1 Salk. 297; *Buckley v. Pirk*, 1 Salk. 317; 1 Saund. 1, note (1). In many instances the profits of the land may be insufficient for a given period, although the lease may, on the whole, be beneficial; as in respect to the rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as, formerly, in the case of a lease of tithes or of meadow grounds which are usually flooded in the winter: Wentw. Off. Ex. 289, 14th edit. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent: *ibid.* 290. In these and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter by special pleading: *Buckley v. Pirk*, 1 Salk. 317; Toller, 280.

(*a*) *Rubery v. Stephens*, 4 B. & Adol. 241, 247. See also *Hopwood v. Whaley*, 6 C. B. 744, where an averment that the defendant "*did not*" was held, after verdict, to mean that he "*could not*" derive any profit from the demised premises; and it was further held that the plea might be taken distributively, and the plaintiff should recover to the extent to which defendant might, by the exercise of reasonable diligence, have derived profit.

Remnant v. Bremridge (b), which was an action for use and occupation generally, where it appeared that the defendant, who was the administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet, it having been proved by the defendant, under the general issue, that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action. This case if it purports to be an authority for the proposition that an administrator is only liable to the extent of what he received is no longer an authority (c).

In *Re Bowes* (d) it was decided that an executor who takes possession of a leasehold of his testator is liable personally, as assign of the lease, for subsequent rent up to the letting value of the holding. And North, J., in delivering judgment says: "The law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for rent accrued during the time in which he was in possession he is entitled to set up, by way of defence, that he is only assign as executor, and that the profits or yearly value of the property amount only to a sum less than the rent. Then he must pay into Court the amount that he admits to be the full value, and if his plea is proved and that is the full value, he will be under no further liability in respect of the matter." The learned Judge goes on to point out that the full value is not the actual amount received by the executor, but the amount which he might have received by the exercise of reasonable diligence.

And on the same principle, although, as it has already appeared (e), an executor, generally speaking, cannot waive the term, for he must renounce the executorship *in toto*, or not at all; yet, if the value of the land is of less amount than the rent; and there is a deficiency of assets, he may waive such a lease (f).

(b) 8 Taunt. 191.

(c) *Whitehead v. Palmer*, *infra*.

(d) 37 C. D. 128; and see *Minford v. Carse*, [1912] 2 Ir. R. 245; *Whitehead v. Palmer*, [1908] 1 K. B. 151.

(e) See *ante*, p. 524.

(f) Wentw. Off. Ex. c. 11, p. 244, c. 12, p. 290, 14th edit.; *Wilkinson v. Cawood*, 3 Anstr. 909, by Macdonald, C. B. (cited by Wood, V.-C., 1 K. & J. 575). He must, it would seem, promptly offer to surrender the lease, and this will help him as to subsequent breaches of covenant. See *Reid v. Lord Tenterden*, 4 Tyrwh. 118, 120; and see *Whitehead v. Palmer*, *supra*.

And if there are assets to bear the yearly loss for some years, but not during the whole term, then, it seems, the executor must pay the rent as long as the assets will hold out, and must then waive the possession, giving notice to the reversioner (*g*).

But if the executor be sued *as executor*, in debt in the *detinet*, for rent incurred after the death of the testator he may plead *plene administravit*: for that is a good plea, wherever no other judgment can be given but only against the defendant as executor (*h*).

So, where the executor is charged *as executor*, in an action of covenant, for non-payment of rent incurred in the defendant's own time, *plene administravit* is a good plea, although the defendant might have been charged as assignee of the term (*i*).

liability of
executor on
assignment of
lease:

It remains to consider how these points are affected by the assignment of the lease. If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him: but still he will be liable as executor in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant (*k*); and even in that case, the executor will be liable *as executor*, in covenant (*l*). If the executor enters, and afterwards himself assigns the lease, then he is chargeable *as assignee*, for that time only during which he occupied (*m*). And if he is sued for rent incurred since the assignment by himself, he is liable in his representative character only: Therefore, if the lessor brings an action of covenant against the executor, and charges that after the testator's death, and the proving of the Will by the defendant, the demised premises came by assignment to one A. B.,

(*g*) Wentw. Off. Ex. *ubi supra*.

(*h*) *Lyddall v. Dunlapp*, 1 Wils. 5.

(*i*) *Ibid.* 4; *Wilson v. Wigg*, 10 East, 315. But if issue be joined upon this plea, and it should be proved that the executor has received any profit from the land, there would, it would seem, be a verdict against him; for he could not legally apply the profits to any other purpose than payment of the rent: Therefore, if the land yields some profit, but less than the rent, the executor ought to plead *plene administravit præter* the profit. This doctrine, however, applies only when the action is brought on a covenant in a lease to pay the rent thereby reserved, and not to a case where the assignor of a lease sues the executor of the assignee on a covenant to perform the covenants in the lease, and to indemnify the assignor for any breach of them, notwithstanding the breach assigned is the non-payment of rent: *Collins v. Crouch*, 13 Q. B. 542.

(*k*) *Helier v. Casbert*, 1 Lev. 127. See *ante*, p. 1372.

(*l*) See *ante*, p. 1372. See *Leigh v. Thornton*, 1 B. & A. 625.

(*m*) See *ante*, p. 1369, note (*c*).

and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit* (n).

It must here be observed, that the Court of Common Pleas held, in the case of *Tremeere v. Morrison* (o), that although, in respect of rent, the personal liability of an executor of a lessee does not exceed the value of the demised premises, yet this qualification does not extend to a covenant for repairs; but that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee: Accordingly, in that case a plea by the executor that the demised premises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit*, and an offer to surrender before the breaches occurred, was held bad on demurrer (p). The principal ground of this decision appears to have been, that the law is clear that an action of waste will lie against an executor for any waste done in his time, as well permissive as voluntary (q).

This decision appears to have been to some extent confirmed by the subsequent case in Q. B. of *Hornidge v. Wilson* (r). That was an action of debt for rent against the defendant as assignee of a term: The defendant pleaded that he was administrator; that the premises were of less value, and had yielded less profit than the arrears of the rent, that is to say, £—; that he had paid over to the plaintiff all the profit he had received, and had fully administered, and had offered to surrender: Replication, that the premises were worth more than the sum in the plea mentioned, and a denial of the surrender: the premises were demised by a party, through whom the plaintiff claimed, to N. for twenty-one years, in 1818, the lease containing a covenant by the lessee to repair: N., in 1827, underlet to E. for twelve years, wanting ten days, at a rent exceeding that reserved in the lease: N. died in 1829, and administration was granted to the defendant in 1830: E. died in 1828, and the premises since that time had been occupied by E.'s sister, who for some years had paid the rent, out of which the plaintiff's rent was paid, but had since become insolvent, and her rent had fallen into arrear: The premises had become out of repair, and had been for some

(n) *Wilson v. Wigg*, 10 East, 313.

(o) 1 Bing. N. S. 89.

(p) But see the observations of Bayley, B., in *Reid v. Lord Tenterden*, 4 Tyrwh. 118, 120.

(q) See *Ives v. Sammes*, 2 Anders, 51; 2 Inst. 302.

(r) 11 A. & E. 645.

years, at the time of the commencement of the action, of less value than the rent reserved in the original lease; but would be of that value if repaired: The defendant had given the plaintiff notice of his willingness to surrender: And the Court of Queen's Bench held, first, that the proof of non-payment of rent by the under-lessee was no defence to this action, on the issue as to the value of the premises: Secondly, that under the same issue, the defendant could not rely on the premises being out of repair as a ground of defence, being himself bound by the covenant to repair. And in *Sleap v. Newman* (*s*), the case of *Tremeere v. Morrison* was expressly recognised and acted on by the Court of Common Pleas.

personal
liability of
executor of
tenant from
year to year
continuing to
occupy:

In *Buckworth v. Simpson* (*t*), A. demised to B. certain lands and premises for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions, as to the management of the lands and repairing the buildings: The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent: And the Court of Exchequer held, that they were chargeable in their personal character, upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract (*u*).

liability from
occupation of
co-executor:

If lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation (*x*).

liability of
executor of
lessee as to
party-walls.

It has been held (*y*), that under the stat. 14 Geo. III. c. 78 (The Building Act), where a party-wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises is liable to contribution out of such rent, though he be owner only as an executor or administrator (*z*).

(*s*) 12 C. B. N. S. 116.

(*t*) 1 Cr. M. & R. 834.

(*u*) See *Arden v. Sullivan*, 14 Q. B. 832, 840.

(*x*) *Nation v. Tozer*, 1 Cr. M. & R. 172; see also *ante*, p. 712.

(*y*) *Thacker v. Wilson*, 3 A. & E. 145.

(*z*) Nor in the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which has taken the place of the above statute, is there anything to alter the liability of executor or administrator as established in the case above cited.

In *Stephens v. Hotham* (a), Wood, V.-C., made a decree of specific performance of a covenant in a lease to take a renewed lease against the executors of the lessee: who had entered and admitted assets: His Honour acted in this case unwillingly and contrary, it seems, to his own opinion, on the authority of the decision of Shadwell, V.-C., in *Phillips v. Everard* (b): And the learned Judge said that, in this case, the lease must be so framed that no personal liability should be incurred by the executors; though if the lease were a beneficial one claimed by them, they must enter into full covenants.

Liability of executor on a covenant by testator to take a renewed lease.

The executor of a licensee of a licensed house is, until the next special sessions for licensing purposes, liable to penalties for breaches of public order on the premises (c). He may on the other hand maintain an appeal from a refusal of the justices to renew the licence (d).

Liability in respect of licensed house.

Apart from Locke King's Act, if the purchaser of real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator (e). And in any case in which the heir or devisee may still be entitled to have the estate paid for by the executor or administrator, as where the testator or intestate has excluded the operation of Locke King's Act by the expression of a contrary intention, if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him (f). And in such a case, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it would seem, be entitled to the personalty so far as it goes: And it was decided, that if by reason of the complication of the testator's affairs, the purchase-money could not be immediately paid, and the vendor for that reason rescinded the contract, yet on the coming in of the assets, the devisee of the estate contracted for might compel the exe-

Liability of executor of vendee of a real estate to complete the purchase.

(a) 1 K. & J. 571.

(b) 5 Sim. 102.

(c) *McDonald v. Hughes*, [1902] 1 K. B. 94.

(d) *Cooke v. Cooper*, [1912] 2 K. B. 248.

(e) *Milner v. Mills*, Mosely, 123; *Broome v. Monck*, 10 Ves. 597. As to the effect of Locke King's Act Amendment Act, 1877 (40 & 41 Vict. c. 34), see *Re Cockcroft*, 24 C. D. 94; and *ante*, p. 1314, note (p).

(f) *Broome v. Monck*, 10 Ves. 614, 615; Sugd. V. & P. 14th edit. 192. See *Lord v. Lord*, 1 Sim. 505.

cutor to lay out the purchase-money in the purchase of other estates for his benefit (*g*).

But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal, in consideration of the Court, upon which the right of the executor on the one hand (*h*), and of the heir or devisee on the other, depends: And therefore: if the vendor dies, the estate will go to the heir-at-law of the vendor, in the same manner as if no contract had been entered into (*i*): and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*k*). The Court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform (*l*): That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor a right to call upon his heir (*m*).

Devolution of
real estate
contracted to
be sold.

Similar principles apply where a vendor dies after there is a valid contract made for the sale of land, and before the sale has been carried out. In such case the purchase-money will devolve as personal estate (*n*): And if the land contracted to be sold has not been conveyed in the lifetime of the testator or intestate, the heir-at-law or devisee will take no beneficial interest. Formerly, the executor could not himself convey the estate, the subject of the contract, but now by the Conveyancing Act, 1881 (44 & 45 Viet. c. 41), s. 4 (1), "where at the death of any person there is subsisting a contract enforceable

(*g*) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. 597; Sugd. V. & P., 14th edit. 192. And see *Lysaght v. Edwards*, 2 C. D. 499, 521.

(*h*) See *ante*, pp. 505, 506; Sugd. V. & P. 14th edit. 193.

(*i*) *Lacon v. Mertins*, 3 Atk. 1; *Att.-Gen. v. Day*, 1 Ves. Sen. 218; *Buckmaster v. Harrop*, 7 Ves. 341. See also *Johnson v. Le Garde*, 1 Turn. & Russ. 281.

(*k*) *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. 597.

(*l*) See *Curre v. Bowyer*, 5 Beav. 6, note (*b*); *ante*, p. 506.

(*m*) Sugd. V. & P. 14th edit. 193. See also *Lysaght v. Edwards*, 2 C. D. 499, 507, *per* Jessel, M. R. And compare *Re Thomas*, 34 C. D. 166.

(*n*) See *Lysaght v. Edwards*, 2 C. D. 499; *Re Thomas*, 34 C. D. 166; *Farrer v. Earl of Winterton*, 5 Beav. 1. See also *Frayne v. Taylor*, 33 L. J. Ch. 228; *Re Harrison*, 34 C. D. 214.

against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract." This section is not to affect the beneficial rights of any person claiming as heir or devisee, and is only to apply in cases of death after the commencement of the Act (the 1st day of January, 1882).

And by sect. 30 of the same Act, which also is only to apply in cases of death after the commencement of the Act, it is provided that "Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purpose of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers."

The result of these two sections, in cases of death after December 31st, 1881, is that where the vendor is a trustee for the purchaser, as defined by Jessel, M. R., in *Lysaght v. Edwards* (o), and the Court of Appeal in *Re Colling* (p), the personal representatives are, under sect. 30, the proper persons to convey, and where, though the vendor is not a trustee within that definition, there is a contract enforceable against the heir or devisee, the personal representatives will be the proper persons to convey under sect. 4.

Now, with regard to persons dying on or after the 1st

(o) 2 C. D. 499, 507.

(p) 32 C. D. 333.

January, 1898, under sect. 1 of the Land Transfer Act, 1897, the real estate as therein defined devolves to and becomes vested in the personal representative (*q*), who consequently in all such cases will be the proper person to convey.

Liability of
an executor
to exonerate
specific
legatees :

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator (*r*).

Therefore if the legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him (*s*).

So in *Stewart v. Denton* (*t*), the testator, a wine merchant, directed by his Will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines: Before the death of the testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported: After his death the wines were entered: And it was held, that the executors, and not the legatees, were chargeable with the duties.

of leaseholds : In *Marshall v. Holloway* (*u*), A., having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees for B. for life with several limitations over: A. died before the time expired, leaving the covenant unperformed in part: and Sir L. Shadwell, V.-C., held that his general personal estate was liable to the performance of the covenant. But it would seem that it was the clause which directed the debts to be paid out of the personal estate which governed this decision (*x*), and its authority has since been doubted (*y*). Unquestionably, the general rule is, that the legatees of leasehold estates must

(*q*) *Ante*, p. 501.

(*r*) *Knight v. Davis*, 3 M. & K. 358; *Bothamley v. Sherson*, L. R. 20 Eq. 304.

(*s*) Swinb. Pt. 7, s. 20, pl. 18.

(*t*) 4 Dougl. 219.

(*u*) 5 Sim. 196; compare *Farquhar v. Haddon*, L. R. 7 Ch. 1; and *Re Holland*, [1907] 2 Ch. 88; and see *Re Timberlake*, [1919] W. N. 42.

(*x*) *Fitzwilliams v. Kelly*, 10 Hare, 266, 278.

(*y*) *Eccles v. Mills*, [1898] A. C. 372.

take them *cum onere* (z), and notwithstanding the general personal estate may remain liable to the lessor by reason of the covenants contained in the lease (a).

In *Hawkins v. Hawkins* (b) a testator specifically bequeathed certain personal estate upon trust for H. and her children after payment thereof of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term of years at a rack-rent and considerably out of repair. This leasehold being worthless, the plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable. And it was held on appeal (reversing Malins, V.-C.), that the plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidation and for rent subsequent to the testator's death paid out of the specifically bequeathed property, on the ground that the liability of the testator's estate to pay the future rent and its liability to damages for the dilapidations were not debts, within the meaning of the clause in the Will directing the payment of debts, as between the residuary and specific legatees.

It is said by Sir George Jessel, M. R., in *Bothamley v. Sherson* (c), that, "In fact, the distinction seems to turn on this: is the charge one created by the testator for what has been called a temporary purpose, that is, with the view of raising money or

(z) *Hickling v. Boyer*, 3 Mac. & G. 635; *Fitzwilliams v. Kelly*, 10 Hare, 266; *Armstrong v. Burnet*, 20 Beav. 432; *Hawkins v. Hawkins*, 13 C. D. 470. Hence, if the demised premises are dilapidated, the executors may require an indemnity against their liability in this respect from the legatee before letting him into possession: *Hickling v. Boyer*, 3 Mac. & G. 635. See further, as to where an executor is entitled to an indemnity, *ante*, p. 1079; and also cf. *Re Courtier*, 34 C. D. 136, and other cases referred to *ante*, p. 1343, n. (m).

(a) Moreover, where the burden is of such a character that the leasehold can be described as "charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money," Locke King's Act will apply as mentioned above. See p. 1315.

(b) 13 C. D. 470, in which case *Marshall v. Holloway*, *ubi supra*, does not seem to have been cited. The decision in the latter case was not, however, affected by that in the former: *Eccles v. Mills*, [1898] A. C. 360, 373.

(c) L. R. 20 Eq. 304, 316.

of making use of the property (as in the case of the wines, for the purpose of the testator making use of the wines and getting them to this country), or is it from its nature a charge incident to the property, as in the case of rent on leaseholds or calls payable on railway shares? In the first place the specific legatee is entitled to have the legacy redeemed or freed from the charge. In the second case he is not entitled, because the testator is supposed to give the thing as it is, and the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing."

of shares
in public
companies.

The obligation of completing the testator's interest in the subject-matter of the bequest falls on the testator's general estate (*d*). Although everything that is due from the testator at his death must be paid out of his residuary personal estate, yet, as between the specific bequest and the residue, that which may become due subsequently is not so payable, notwithstanding that by reason of his covenant the testator's residuary personal estate may remain liable thereto. Thus with respect to specific legacies of shares in banking or other public companies, if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate; but if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee (*e*).

Of share of
business.

A legatee of a share of a business or of partnership property is entitled to take the share free from the obligation to discharge the trade debts and liabilities incurred by the testator (*f*).

Liability of
executor as to
apprentices
and artied
clerks.

There has already been occasion to show, that on the death of the master, the agreement for service on the part of the apprentice is at an end, generally speaking (*g*): And it seems equally well established, that the executors of the master are discharged

(*d*) *Armstrong v. Burnet*, 20 Beav. 424; *Fitzwilliams v. Kelly*, 10 Ha. 266; *Eccles v. Mills*, [1898] A. C. 373; *Re Hughes*, [1913] 2 Ch. 491.

(*e*) *Blount v. Hipkins*, 7 Sim. 43; *Jacques v. Chambers*, 2 Coll. 435; 11 Jur. 295; *Clive v. Clive*, Kay, 600; *Wright v. Warren*, 4 De G. & Sm. 367; *Armstrong v. Burnet*, 20 Beav. 424. See also *Moffett v. Bates*, 3 Sm. & G. 468; *Day v. Day*, 1 Dr. & Sm. 261; *Addams v. Ferick*, 26 Beav. 384. But this does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares) as an entire fund. There the true test is, whether the shares have or have not been separated from the general residue at the date of the call: *Re Box*, 1 Hemm. & M. 552. See also the cases collected, *ante*, p. 1180, note (*z*).

(*f*) *Re Holland*, [1907] 2 Ch. 88; *Re Timberlake*, [1919] W. N. 42.

(*g*) *Ante*, p. 627 *et seq.*

from all agreements and covenants *for the instruction* of the apprentice, for these are considered as personal to the testator, and determined by his death (*h*). But the covenant on the part of the master *for maintenance* of the apprentice still continues in force (*i*); and therefore the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him (*k*). By the custom of London, the executor shall put the apprentice to another master of the same trade (*l*). As to maintenance of parish apprentices by executors, particular provisions on this head have been made by the statute 32 Geo. III. c. 57, which has already been stated at large (*m*). Where an attorney or other person, to whom a clerk or youth has been articulated or apprenticed, dies before the articles expire, his estate is not liable for the return of any part of the premium (*n*).

In case a person assessed to the poor rate dies before payment, it has been doubted how far the goods of the deceased in the hands of his executor or administrator are liable to answer the same: In the case of *Stevens v. Evans* (*o*), the point was discussed, but not decided, as the case was determined on its own peculiar circumstances, viz., on the ground that it was necessary to convene the administrator before the justices, before a warrant could legally issue to distrain: So that the principal point was undecided; which includes in it these particulars: 1. Where the warrant of distress is made out during the lifetime of the person assessed, whether the officers can follow the goods into the hands of the administrator or any other, without taking notice of any person as executor or administrator: 2. Where the warrant of distress is not made out till after the death of the

Liability of executor for poor rate, where testator being assessed dies before payment:

(*h*) *R. v. Peck*, 1 Salk. 66; *Baxter v. Burfield*, 2 Stra. 1266; *Wadsworth v. Guy*, 1 Keb. 820; *ante*, p. 1336. The decision in *Walker v. Hull*, 1 Lev. 177, was *contra*; but the Court denied this case in *Baxter v. Burfield*, 2 Stra. 1267. But see *Cooper v. Simmons*, 7 H. & N. 707, *ante*, p. 628.

(*i*) *R. v. Peck*, 1 Salk. 66; *S. C.*, *nomine R. v. Pett*, 1 Show. 405; *Baxter v. Burfield*, 2 Stra. 1266; *Soam v. Bowden*, Finch. Rep. 396.

(*k*) But an order of magistrates that the executor or administrator shall maintain and provide for the apprentice is bad, and may be quashed: *R. v. Pett*, 1 Show. 405; *S. C.*, Carth. 231; 1 Salk. 66; 3 Salk. 41; 12 Mod. 27; *R. v. Chaplin*, Comberb. 324.

(*l*) By Lord Holt, in *R. v. Peck*, 1 Salk. 66.

(*m*) *Ante*, p. 628.

(*n*) *Whincup v. Hughes*, L. R. 6 C. P. 78; and *Ferns v. Carr*, 28 C. D. 409. *Hirst v. Tolson*, 2 Mac. & G. 134, must now be treated as overruled. See also *ante*, p. 629.

(*o*) 2 Burr. 1152; 1 W. Black. 234.

person assessed, whether on summoning the administrator, and refusal by him, the officers can distrain the goods in the hands of such administrator: 3. Whether the administrator himself may be assessed in a succeeding rate, as for arrears; and on the assessment being confirmed at the sessions upon his appeal, whether distress may be made as of his own goods, and whether for defect of distress he may be committed: 4. In what course of administration such assessment shall be estimated: And if the administrator shall plead before the justices debts of a higher nature, or insufficiency of assets, whether and how far the justices are to take notice of such plea, and how or in what manner they shall determine the same (*p*).

Church-rates. It was held in the Ecclesiastical Court that the obligation to pay a church-rate was a personal obligation: And that the executor of a deceased parishioner could be cited in respect of a church-rate due from his testator (*q*).

Debts of husband and wife.

With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, at common law the husband is liable, as long as both parties are alive: But this liability, which originated in the marriage, ceases with it: And therefore upon the death of the husband before the wife, and before payment, the debts survive against her, and the executor of the husband is discharged from them (*r*).

Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her (*s*). Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets (*t*).

This question of the ante-nuptial debts and liabilities of a married woman has been dealt with by the Married Women's Property Act, 1882, as follows:

45 & 46 Vict.
c. 75, s. 13.
Wife's ante-

Sect. 13. "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property (*u*)

(*p*) Burn's Justice, title Poor, vol. iv. pp. 228, 229, edit. of 1836.

(*q*) *Williams v. George*, 3 Curt. 343. By stat. 31 & 32 Vict. c. 109, compulsory church-rates were abolished, with a saving of rates called "church-rates," but applicable for a secular purpose.

(*r*) *Woodman v. Chapman*, 1 Campb. 189.

(*s*) Wentw. Off. Ex. 369, 14th edit.

(*t*) *Ibid.* 370; *Heard v. Stanford*, Cas. temp. Talb. 173; *S. C.*, 3 P. Wms. 409.

(*u*) See sect. 19 of the Act; *Jay v. Robinson*, 25 Q. B. D. 467; and

for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

Sect. 14. "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Act relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise: and any Court in which a husband shall be sued for

nuptial debts
and liabilities.

Sect. 14.
Husband to
be liable for
wife's ante-
nuptial debts
to a certain
extent.

sect. 1 of the Married Women's Property Act, 1893, and sect. 2 of the Married Women's Property Act, 1907. And generally as to liability of a married woman's property, notwithstanding restraint on anticipation, see *Sanger v. Sanger*, L. R. 11 Eq. 470; *London Provincial Bank v. Bogle*, 7 C. D. 773; *Re Hedgeley*, 34 C. D. 379; *Robinson, King & Co. v. Lynes*, 22 Q. B. D. 548; *Pelton Bros. v. Harrison*, [1891] 2 Q. B. 422; *Re Wheeler's Trusts*, [1899] 2 Ch. 717; *Birmingham Excelsior v. Lane*, [1904] 1 K. B. 35; and see also *post*, Pt. v. Bk. II. Ch. I.

any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

General
result.

The general result of these sections seems to be this. Whereas at common law a husband was liable to the ante-nuptial debts of his wife to the whole extent of his property whether he knew of their existence or not, and whether he obtained any property from his wife or not: but he could not be sued alone for such debts if his wife was alive; and he could not be sued at all for them after his wife's death, except as her administrator: now, by the effect of these sections, the husband is liable only so far as he has acquired or become entitled to property from or through his wife, and he can be sued without the wife, and whether she be alive or dead (*x*). It must be noted, however, that these sections of the Act will not apply to cases where the marriage has taken place before August 9th, 1870, which will be governed by the common law as explained above, or, in the case of marriages between August 9th, 1870, and December 31st, 1882, inclusive, by the Married Women's Property Act, 1870, and the amending Act of 1874. As regards marriages between these dates the law stands shortly thus. Where the husband and wife were married on or after August 9th, 1870, and before July 30th, 1874, sect. 12 of the Act of 1870 entirely relieves the husband of all liability for his wife's ante-nuptial debts, and gives the creditor an equitable remedy only against the wife's separate estate (*y*). But the liabilities of the husband for his wife's torts committed, or breaches of contract made, before marriage were not affected by the statute. Where, however, the marriage took place on or after July 30th, 1874, and before January 1st, 1883, the amending Act of 1874 provides that the husband and wife may be jointly sued for any ante-nuptial debt of the wife or for any tort committed, or breaches of any contract made by the wife before marriage, and that the husband shall be liable in respect of such matter to the extent of the assets specified in sect 5,

(*x*) See *Beck v. Pierce*, 23 Q. B. D. 316, 321.

(*y*) See as to the construction of this section, *Sanger v. Sanger*, L. R. 11 Eq. 470; *Re Hedgeley*, 34 C. D. 379. And see *ante*, p. 576, note (*i*).

which, briefly, are any property which the husband has acquired or might have acquired from or through his wife.

Although a husband is not liable on his wife's contract, he is liable for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract, and is the means of effecting or inducing it and is part of the same transaction. The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts during coverture, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her during coverture (z).

Liability in respect of fraud or tort committed by wife during coverture.

After the passing of the Married Women's Property Acts, 1870, 1874, it was held, in *Re West of England Bank (a)*, that where a woman, absolutely entitled to shares in a company, married in 1878, and before the marriage the shares were settled absolutely upon her for her benefit, that this did not relieve the husband from his liability as a contributory under the 78th section of the Companies Act, 1862 (replaced by s. 128 of the Act of 1908), which enacts that "if any female contributory marries either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly. The ground of this decision was that the section made the husband liable as the debtor, not as the husband of the debtor.

Husband's liability as a contributory in respect of his wife's shares in a company.

By the Married Women's Property Act, 1882, s. 13, a woman after her marriage shall continue to be liable in respect or to the extent of her separate property for all debts contracted and all contracts entered into before her marriage, including any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories under and by virtue of the Acts relating to joint stock companies: and by sect. 14, the husband shall be liable for the debts of his wife contracted, and for all contracts entered into, by her before marriage, including any liabilities to which she may be so subject under the acts relating to joint stock com-

(z) *Seroka v. Kattenburg*, 17 Q. B. D. 177; *Earle v. Kingscote*, [1900] 2 Ch. 585. See also *Beaumont v. Kaye*, [1904] 1 K. B. 292.

(a) 12 C. D. 284.

panies as aforesaid to the extent of all property belonging to his wife which he shall have acquired or become entitled to from or through his wife, but he shall not be liable for the same any further or otherwise.

On one occasion (*b*), Sir John Leach, V.-C., expressed a doubt, whether the husband has a right to throw his wife's funeral expenses upon her separate estate.

Wife's post-nuptial debts.

With respect to debts contracted by a wife after marriage, so far as the supply of necessities is concerned, it shall be presumed, as long as he lives, 'that she had the authority of the husband, as his agent, to procure them for her own use (*c*). He may consequently be compelled to pay for them, and so may his executors if he has assets: But the authority will be revoked by the death of the husband; and therefore his executor is not liable for necessities supplied to the wife after the decease of the husband, even (according to one case) although the fact of his being dead were unknown at the time the necessities were provided: Accordingly, in *Blades v. Free* (*d*), a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: And it was held, that the woman might have the same authority to bind him by her contracts for necessities, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received (*e*).

Work and labour with a view to a legacy.

It may be observed, that if a man performs services for the testator, as if a stockbroker transacts all the money concerns of the deceased, without any view to a reward, but in the expectation of a legacy, he cannot set up any demand for such services

(*b*) *Gregory v. Lockyer*, 6 Madd. 90. See *Willeter v. Dobie*, 2 Kay & J. 647. In *Re McMyn*, 33 C. D. 575, however, Chitty, J., held that a husband, executor of his wife's Will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her Will did not contain any charge of debts and funeral expenses.

(*c*) As to the extent of this presumption and how far the agency is a question of fact, see *Debenham v. Mellon*, 6 A. C. 24; *Morel Bros. v. Earl of Westmoreland*, [1903] 1 K. B. 64; [1904] A. C. 11; *Paquin v. Beauclerk*, [1906] A. C. 148.

(*d*) 9 B. & C. 167.

(*e*) See *Smout v. Ilbery*, 10 M. & W. 11. But see also Smith's Leading Cases, 12th edit., Vol. II., p. 369 *et seq.*

against the executor or administrator (*f*). Where, however, a surgeon forebore to send in his bill for medicine and attendance to a deceased patient in her lifetime *under the expectation* of a legacy; and on her death, finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy (*g*).

In *Colegrave v. Manby* (*h*), a tenant for life of a hospital lease, who was directed to lay by, out of the rents and profits, for the purpose of paying the fine on renewal, had neglected to renew, and the lease having been renewed by the remainderman, after his death, a reference, on a bill against his executrix, was made, to ascertain what was a reasonable sum to be paid for the renewal; and the same was ordered to be paid by the executrix.

Executor of tenant for life who neglects to renew lease.

It was once held; that executors continued the estate which their testator had in a copyhold, and, therefore, that they needed no admission: But it is now settled that they must be regularly admitted, and pay their fines (*i*). And by sect. 1 (4) of the Land Transfer Act, 1897, the expression "real estate," in Part I. of that Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Executors must be admitted to copyhold and pay fines.

If a bill of exceptions was sealed by a Judge and he died, a *scire facias* lay against his executors or administrators to certify it (*k*). So if the person who ought to certify a record, as a justice of the peace, &c., who hath taken a recognizance, or a Judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, &c., happen to die, having such a record

Scire facias or *certiorari* against executor of Judge, &c.

(*f*) *Osborn v. Guy's Hospital*, 2 Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. 188; cf. *Maddison v. Alderson*, 8 A. C. 467.

(*g*) *Baxter v. Gray*, 3 M. & Gr. 771. But see *Shallcross v. Wright*, 12 Beav. 558, and *post*, p. 1420.

(*h*) 6 Madd. 72.

(*i*) *Bath v. Abney*, 1 Burr. 206. See *ante*, p. 1287, as to trust and mortgage estates in copyhold property.

(*k*) 2 Inst. 428. By the Judicature Act, 1875, Ord. LVIII. r. 1, bills of exceptions are abolished.

in his custody, it seems that a *certiorari* may be directed to his executor or administrator to certify it (*l*).

Executor not compellable to complete the gift of testator.

As a Court of Equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of the testator: Therefore an act of bounty which has not been perfected by the testator is of no avail against his executor (*m*). An incomplete gift may however be perfected by the donor appointing the donee as his executor (*n*).

As to corroboration in cases of claims against estate of deceased persons.

It has been said (*o*) that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person, but there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, such uncorroborated evidence should be examined with care and even with suspicion, but if in the result it convinces the Court that the claim should be allowed, the Court should allow the claim. The rule, such as it is, is a rule of prudence rather than of law, and applies to cases of alleged debt as well as to cases of alleged gift (*p*). In the case of *Hill v. Wilson* (*q*), which, however, was a case where parol evidence was tendered for the purpose of altering the terms of a written contract made with the deceased, Lord Justice James said: "The evidence given is the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead. Even if such evidence be legally

(*l*) 2 Hawk. B. 2, c. 27, s. 39.

(*m*) *Hooper v. Goodwin*, 1 Swanst. 485; *Cotteen v. Missing*, 1 Madd. 176; *Meek v. Kettlewell*, 1 Phil. Ch. C. 342; *Callaghan v. Callaghan*, 8 Cl. & F. 374; *Searle v. Law*, 15 Sim. 95; *Dillon v. Coppin*, 4 M. & Cr. 647; *Ward v. Audland*, 8 Beav. 201; *Cox v. Barnard*, 8 Hare, 310; *Bridge v. Bridge*, 16 Beav. 315; *Weale v. Ollive*, 17 Beav. 252; *Beech v. Keep*, 18 Beav. 285; *Marler v. Tommas*, 17 Eq. 8, 12. An executor may be compelled to execute an agreement by the testator to grant an annuity: *Nield v. Smith*, 14 Ves. 491.

(*n*) *Re Stoneham*, [1919] 1 Ch. 149; and see *ante*, p. 1058.

(*o*) See *Re Whittaker*, 21 C. D. 657, 663.

(*p*) *Lovesey v. Smith*, 15 C. D. 655; *Re Finch*, 23 C. D. 267; *Re Garnett*, 31 C. D. 1; *Re Hodgson*, 31 C. D. 177; *Re Farman*, 57 L. J. Ch. 637, 639; *Rawlinson v. Scholes* (1898), 79 L. T. 350.

(*q*) L. R. 8 Ch. 888; cf. *Parish v. Parish*, 32 B. 207.

admissible for any purpose, the interests of mankind, in my opinion, imperatively require that, unless corroborated, it should be wholly disregarded. Nobody would be safe in respect of his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavoured to be enforced by his executors could be set aside, or varied, or altered by the parol evidence of the person who had bound himself. It would be very easy of course for anybody who owed a testator a debt to say, 'I met the testator, and he promised he would not sue.' 'I met the testator and I gave him the money.' 'I met the testator, and in consideration of something he agreed to relieve me.' The interests of justice and the interests of mankind require that such evidence should be wholly disregarded."

If a person, who has delivered a deed as an escrow, to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available notwithstanding the death of him that made it (r).

Liability of executor of a man who has delivered a deed as an escrow.

It may here be mentioned, that if a testator has given a promissory note in this form, "I promise for myself and my executors to pay A. B. or his executors, one year after my death, 300*l.*, with legal interest," and no proof of the consideration can be given, the note bears interest from its date, and not merely from the testator's death; for, in the absence of all particular proof, it must be presumed that the note was given for value (s).

A note made payable with interest by executors at a certain period from the testator's death, bears interest from the date.

The death of the surety does not *per se* operate as a revocation of a continuing guaranty (t), and his executor may be liable in respect of advances made after the testator's death (u).

Liability of executor on a continuing guaranty of testator.

(r) By Lord Ellenborough, in *Copeland v. Stephens*, 1 B. & A. 606, where *executor* appears to be printed by mistake for *escrow*. See also, as to the nature of an *escrow*, *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608.

(s) *Roffey v. Greenwell*, 10 A. & E. 222. See also Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (3).

(t) By sect. 18 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which substantially re-enacts sect. 4 of the Mercantile Law Amendment Act, 1856, it is enacted that:—"A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transaction of which the guaranty or obligation was given."

(u) Smith's Merc. Law, 11th edit. 635; *Bradbury v. Morgan*, 1 H. &

Although upon the death of the surety no express notice of the death has been given by the executor, still, if the fact of such death has come to the knowledge of the creditor, it seems in the absence of express provision that this will operate as a revocation of the guaranty, and the executor will not be liable for subsequent advances made thereunder (*x*).

But a guaranty, the consideration for which is given once and for all, as for instance where an office or employment is conferred in consideration of such a guaranty, cannot be determined by the guarantor, and does not cease on his death (*y*).

C. 249; *Harriss v. Fawcett*, L. R. 15 Eq. 311; L. R. 8 Ch. 866, 869, per Mellish, L. J.; *Re Silvester*, [1895] 1 Ch. 573.

(*x*) *Harriss v. Fawcett*, *ubi supra*; *Coulthart v. Clementson*, 5 Q. B. D. 42; *Re Whelan, deceased*, [1897] 1 I. R. 575.

(*y*) *Gordon v. Calvert*, 2 Sim. 253; 4 Russ. 581; *Lloyd's v. Harper*, 16 C. D. 290; *Re Crace*, [1902] 1 Ch. 733.

CHAPTER THE SECOND.

THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH RESPECT
TO HIS OWN ACTS.

SECTION I.

*The liability of an Executor or Administrator on his own
Contracts.*

IN this section it is proposed to investigate, First, the liability of an executor or administrator, *as such*, in respect of his own contracts as executor or administrator: Secondly, the personal responsibility of the executor or administrator on his own contracts (*a*).

1st, As to the liability of the executor, not personally, but out of the assets of the testator. It seems to have been once considered, that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity (*b*). The more modern authorities have, however, established, that, in several instances, the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator.

1st. Of the liability of an executor, as such, on his own contracts.

Thus in *Douse v. Coxe* (*c*), the declaration stated that a cause depending in Chancery in which Thomas Biddle was a party, was referred to arbitration, and that it was one of the terms of submission that in case either of the parties should die, the death was not to abate the reference; that Thomas Biddle died before

(*a*) Notwithstanding the change in the system of pleadings since the Judicature Act, it has been thought more convenient to leave this section as it stood in the former Editions of this Work.

(*b*) See *Trewinian v. Howell*, Cro. Eliz. 91; *Hawkes v. Saunders*, Cowp. 289; *Jennings v. Newman*, 4 T. R. 348.

(*c*) 3 Bing. 20; *S. C.*, 10 Moore, 272.

the making of the award; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of Thomas Biddle; and that being so liable, the defendant, executor as aforesaid, *promised to pay*: And the Court of C. B. held that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris* (d).

So in *Powell v. Graham* (e), one count of the declaration stated a promise by the testator in his lifetime, that, in consideration the plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof *the defendant promised to pay* the plaintiff that sum, whenever he, the defendant, as executor, should be requested so to do: And the Court of C. B. held, that, upon this count, the defendant was not liable individually, but as executor only: And in the same case the Court held, and it is now fully settled, that a count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof *the defendant as executor promised to pay* the balance, does not charge him personally; but he may plead *plene administravit*, and the whole judgment which can be given in favour of the plaintiff is *de bonis testatoris* (f): And it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff (g), or of money due from the defendant *as executor* to the plaintiff (h).

So it would seem that a count averring that the defendant, *as executor*, was indebted to the plaintiff for so much money, paid by the plaintiff to the use of the defendant, *as executor*, and that in consideration thereof the defendant, *as executor, promised to pay*, charges the defendant in his representative character only,

(d) This judgment was reversed in K. B., but on a different ground, the Court of Error declining to give any opinion on this point: 6 B. & C. 255. As to the personal responsibility of an executor on a submission to arbitration, see *post*, p. 1406.

(e) 7 Taunt. 581; S. C., 1 B. Moore, 305.

(f) *Ashby v. Ashby*, 7 B. & C. 444.

(g) *Secar v. Atkinson*, 1 H. Bl. 102; *Ellis v. Bowen*, Forrest, Exch. Rep. 98. This is the common mode of declaring against executors to save the Statute of Limitations, 1 H. Bl. 105.

(h) *Powell v. Graham*, 7 Taunt. 580; *Ashby v. Ashby*, 7 B. & C. 444; but see *Rose v. Bowler*, 1 H. Bl. 108; 2 Saund. 117, *h*, note to *Coryton v. Litheby*.

and that he may plead *plene administravit* to it, and that the judgment ought to be *de bonis testatoris* (i). For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued and obliged to pay the whole debt: In such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it would therefore seem that he is entitled to sue the executor of the deceased for money paid to his use as executor (j). Again, a plaintiff may in many cases have an advantage in proceeding against the assets rather than against the executor personally: the executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim: and when the money is paid to his use as executor, justice seems to require that the person who has made the payment should have the liberty of looking to the fund which the executor has in that character (k).

But a count alleging that the defendant, *as executor*, was indebted to the plaintiff for so much money *lent* by the plaintiff to the defendant, *as executor*, and that the defendant, in consideration thereof, *as executor promised to pay*, charges him personally, and he cannot plead *plene administravit*, and the only possible judgment is *de bonis propriis* (l).

(i) *Ashby v. Ashby*, 7 B. & C. 448, 449, 451, 452. This point was conceded by the counsel and the Court, in *Corner v. Shew*, 3 M. & W. 350.

(j) *Ashby v. Ashby*, 7 B. & C. 449, 451, 452, by Bayley, J., and Littledale, J. See also *Batard v. Hawes*, 2 E. & B. 287, 298, where these *dicta* were regarded as strong authority for holding, that if one of several co-contractors be compelled by suit to pay the whole debt, he may sue the executors of another of them, *who has died before payment* for contribution.

(k) *Ashby v. Ashby*, 7 B. & C. 449. But it must not be understood that one who has paid off a debt of a testator or advanced money to an executor to enable him to do so, can follow the assets into the hands of another to whom the executor has aliened them: *Haynes v. Forshaw*, 11 Hare, 104; *ante*, p. 693, note (d).

(l) *Rose v. Bowler*, 1 H. Bl. 108; *Powell v. Graham*, 7 Taunt. 586. An executrix of a testator kept an executorship account with a bank, and, having a power under the Will to mortgage the real estate in aid of the personalty, deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account having been considerably overdrawn, and the moneys to a great extent misapplied, the bank having no notice of such misapplication, and the security proving insufficient to pay the balance, applied to prove against the testator's estate for the difference. It was held on appeal by L.J.J. James and Mellish that the bank was not entitled to prove, for that a person cannot, by contract with an executor, acquire a right to prove against the estate, though the executor has power to give him a lien on specific assets: *Farhall v. Farhall*. 1. R. 7 Ch. 123.

And so it is of a count which charges that the defendant, *as executor*, was indebted to the plaintiff *for money had and received* by the defendant, *as executor*, for the use of the plaintiff, and that in consideration thereof, the defendant, *as executor*, *promised to pay*; for to such a count *plene administravit* cannot be pleaded, and the judgment on it must be *de bonis propriis* (*m*). But in *Ashby v. Ashby* (*n*), Lord Tenterden said, that although he felt himself bound by the authorities on the point, yet if the matter were quite new, it might, perhaps, be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the executor in his character of executor, and take his chance whether he would get paid out of the assets or not, and that if he elected so to treat it, then he must show that the money came into the defendant's hands because he was executor: And Bayley, J., concurred in this opinion, and put the following case: "Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person: Before the bill arrives, the testator dies, and his executor receives the money: It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration: He may be insolvent in his individual capacity; and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator": The learned Judge, however, proceeded to observe, that the authorities were so strong, that he felt himself bound by them, although his reason was not convinced (*o*).

(*m*) *Rose v. Bowler*, 1 H. Bl. 198; *Jennings v. Newman*, 4 T. R. 347; *Brigden v. Parkes*, 2 B. & P. 424; *Powell v. Graham*, 7 Taunt. 585, 586; *Ashby v. Ashby*, 7 B. & C. 444.

(*n*) 7 B. & C. 448.

(*o*) 7 B. & C. 450. But Littledale, J., expressed his opinion that, if the case were perfectly new, the defendant ought to be held personally liable upon the count in question; and observed, that where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received, it having nothing to do with the accounts of the testator: 7 B. & C. 452, 453. Perhaps an illustration of this view may be found in *Churchill v. Bertrand*, 3 Q. B. 568, where an intestate had granted an annuity to the plaintiff, and, after his death, his administratrix procured it to be set aside for a defect in the memorial; and it was held that the consideration money for the annuity could not be recovered back as money had and received *by the intestate* for

Again, a count upon a promise by the defendant, *as executor*, for *use and occupation* after the death of the testator, has been held to charge the defendant personally, and not in his character of executor (*p*). So a count alleging that the defendant, *as executor*, was indebted to the plaintiff for *goods sold and delivered* by the plaintiff to the defendant, *as executor*, at his request, or for *work done* and materials for the same used and provided by the plaintiff for the defendant, *as executor*, at his request, and that the defendant, *as executor*, promised to pay, charges the defendant in his personal and not in his representative character; for such a claim must necessarily be for debts due from the defendant in his own right, as no goods can be sold to or work performed for another in his representative character (*q*). The common count *for interest* charges the executor personally; for it alleges a forbearance *at his request*: But a count charging that the defendant is indebted *as executor* on a contract by the testator to pay interest as long as the debt should be forborne, charges him as executor only (*r*).

In actions like those above mentioned, which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere *nudum pactum*, if there were no assets (*s*). But it is not necessary to aver in the declaration that the defendant had assets (*t*).

2ndly, It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

2. Of the personal liability of an executor on his own promise:

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support the promise: For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the

the use of the plaintiff, since the election to vacate the annuity did not make the money had and received to the use of the grantee from the time of the grant by relation.

(*p*) *Wigley v. Ashton*, 3 B. & A. 101. But see *Atkins v. Humphrey*, 2 C. B. 654.

(*q*) *Corner v. Shew*, 3 M. & W. 350. See *post*, p. 1409 *et seq.* as to charging an executor for the expenses of the funeral.

(*r*) *Bignell v. Harpur*, 4 Exch. 773.

(*s*) 1 Saund. 210, c. 211, note (1) to *Forth v. Stanton*; *Pearson v. Henry*, 5 T. R. 8; *Rann v. Hughes*, 7 T. R. 350, note (*a*).

(*t*) *Powell v. Graham*, 7 Taunt. 580; *Dowse v. Core*, 3 Bingham. 20. See also *Pinchon's Case*, 9 Co. 90, *b*.

same manner as he would have been had no such promise been made (*u*). And by the Statute of Frauds, the executor or administrator will not be liable, unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute than before, unless it be by deed or there be a good consideration for it. Hence, since the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate: 1st, the common law requires that there should be a sufficient consideration to support the promise; 2nd, the statute adds a still further requisite, that the promise should be in writing (*x*). It is therefore expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis*: and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the Statute of Frauds.

Before entering upon this inquiry, it may be remarked, that a promise by an *administrator*, by word of mouth, made *before* administration granted, may, under certain circumstances, be binding upon him afterwards: Thus in *Tomlinson v. Gill* (*y*), a person promised the widow of an intestate, that if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts; and Lord Hardwicke held that this promise was not within the Statute of Frauds, because the party promising was not administrator at the time of making the promise; and it was no answer to say that he was administrator afterwards (*z*): His Lordship further held, that this was an engagement which could be made good only in a Court of Equity; because it was not made to the creditors, who could, therefore, claim only through the widow; but that they were entitled in equity to the performance of the promise made to her; because it was to be considered there as made to her in trust for them (*a*).

(*u*) *Reech v. Kennegal*, 1 Ves. Sen. 126.

(*x*) 29 Car. II. c. 3, s. 4; *Rann v. Hughes*, 4 Bro. P. C. 27, Toml. edit.; *S. C.*, 7 T. R. 350, note (*a*); *Hawkes v. Saunders*, Cowp. 289; *Philpot v. Briant*, 4 Bingh. 717. But see *Herbert v. Powis*, 1 Bro. P. C. 355, Toml. edit.

(*y*) Ambl. 330.

(*z*) See *ante*, pp. 314, 477 *et seq.*, as to the difference between the relation of probate and letters of administration to the death of the testator and intestate.

(*a*) This case was recognised by Lord Northington in *Griffith v.*

1st, What is a valid consideration: If a creditor, at the request of an executor, *forbears* to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets: As if A., to whom the testator was indebted, comes to the executor, and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit is a good consideration, without assets at the time of the promise (b). So if a man declares upon a promise against an administrator, that the intestate was indebted to him in 10*l.* by bond, and died, and the defendant being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt; and avers that he spared him till the time, and the defendant had not paid him, &c., though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good (c). So it was said by Hale, C. J. that though a bare

what is a sufficient consideration for his promise :

Sheffield, 1 Eden, 77; and by Sir W. Grant, in *Gregory v. Williams*, 3 Meriv. 590. A promise, however, by a party who is neither the executor nor administrator, to pay a debt of a deceased person, is merely *nudum pactum*; and even if such a party should give his promissory note to the creditor for the debt without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor: *Nelson v. Serle*, 4 Mees. & W. 795, overruling *Serle v. Waterworth*, *ibid.* 9; *ante*, p. 181. If, indeed, the note be made payable at a future date, and the maker be entitled to take out administration, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note; because the effect of giving it is to preclude the payee during its currency from suing the maker, in case the latter should take out administration: 4 M. & W. 9. Where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it: *Ridout v. Bristow*, 1 Cr. & Jerv. 231, *post*, p. 1403, note (m).

(b) *Johnson v. Witchcott*, 1 Roll. Abr. 24, tit. Action sur Case (V.), pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is said in *Banc's Case*, 9 Co. 94, a, that if there be no assets, *it shall be given in evidence*: but this opinion has been overruled since. See the cases in the text, *supra*.

(c) *Gardener v. Fenner*, 1 Roll. Abr. 15, tit. Action sur Case (S.). pl. 3; *Chambers v. Leversage*, Cro. Eliz. 644.

accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will (*d*). Also where the plaintiff having a debt owing to him from the testator on a simple contract, the executor in consideration that the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise: but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have been against him, because without consideration; for the heir is not chargeable to any debt without specialty (*e*). So where in *assumpsit*, the plaintiff declared that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and no assets *ultra*; upon which the plaintiff demurred, and had judgment without argument; for it was not material whether he had assets or not; for he was charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy was a sufficient consideration; although it was said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient (*f*). It is true that it is now settled that no action at law lies for a general legacy (*g*), but in this case the forbearance might have been to sue in Chancery, or, formerly, in the Ecclesiastical Court, for the legacy, and then the consideration may, perhaps, be a good one (*h*). So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and makes D. his executor, and D., in consideration that A. will forbear to sue him until such a time, promises to pay him, this is sufficient consideration to support the promise (*i*). So if an executor be indebted to J. S. in 100*l.* who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day*, it becomes *his own debt*, and to be satisfied out of *his own estate* (*k*). So B. having

(*d*) *Hawes v. Smith*, 2 Lev. 122.

(*e*) *Fish v. Richardson*, Yelv. 55, 56.

(*f*) *Davis v. Reynier*, 2 Lev. 3; *S. C. nomine Davis v. Wright*, 1 Ventr. 120; 2 Keb. 758.

(*g*) *Deeks v. Strutt*, 5 T. R. 690. See *post*, Pt. v. Bk. II. Ch. I.

(*h*) See 2 Saund. 137, *d.*, note to *Barber v. Fox*.

(*i*) *Scott v. Stevens*, 1 Sid. 89.

(*k*) *Goring v. Goring*, Yelv. 11. See *Reech v. Kennegal*, 1 Ves. Sen. 126.

died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same at 5*l.* per cent. until the same is settled: " And it was held, that the executors were personally liable to pay the debt and interest (*l*).

Accordingly, where two executors gave a promissory note to the plaintiff in the following words, "*As executors to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.* on demand with lawful interest for the same*": And the Court of C. B. held that they were personally liable on the instrument, upon the ground that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day makes the debt his own (*m*).

(*l*) *Bradly v. Heath*, 3 Sim. 543.

(*m*) *Childs v. Monins*, 2 Brod. & Bing. 460; *S. C.*, 5 Moore, 281. See also *Barnard v. Pumfrett*, 5 M. & Cr. 71; *Lucas v. Williams*, 3 Giff. 151. See also *Ridout v. Bristow*, 1 Cr. & J. 231, where a widow had given a promissory note for "value received by my late husband"; and it was held that the note was valid on the face of it; and Bayley, J., said, "If an administratrix takes upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security supersedes the necessity of an investigation as to there being assets. It seems to me that the words 'value received by my late husband' do not make the proof of assets necessary; and I go still further, and say that it was not competent for her to show that there were no assets." But where an executrix gave an acceptance for a debt, due from her testator, taking an engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3,000*l.* to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance: *Bowerbank v. Monteiro*, 4 Taunt. 844. Where a bill is endorsed to a person as executor, and he again endorses it, he becomes personally liable, unless he endorses it in such terms as to negative personal liability: Bills of Exchange Act (45 & 46 Vict. c. 61), s. 31 (5). See sect. 16 (1) as to endorsements limiting or negating liability. And by sect. 26 (1) of this Act, it is enacted that where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. See *King v. Thom*, 1 T. R. 489; *Alexander v. Sizer*, L. R. 4 Ex. 102.

Again, where the plaintiff declared in *assumpsit* that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; it was held that this was not a sufficient consideration to support the promise, so as to charge the defendant *de bonis propriis* (n): But if the promise had been in consideration of forbearance by such assignee of the debt to sue the executor or administrator, that would have been sufficient (o): for it is sufficient, in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue (p).

So where the plaintiff declared in *assumpsit* that the husband of the defendant was indebted to the plaintiff in 50*l.* for beer, and died intestate, and administration was committed to the defendant, and that afterwards, she, in consideration that the plaintiff would deliver to her six barrels of beer, promised to pay to the plaintiff, as well the 50*l.* due by the intestate, as for the six barrels delivered to herself, and that he thereupon delivered the six barrels; it was held that the action was well brought against her on her own *assumpsit*, and that the judgment should be for both debts *de bonis propriis* (q).

So where an attorney delivered up deeds to an executor, which he was not obliged to do till the bill was paid, and these deeds were of great use to the executor in several suits which were then being carried on; it was held, that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not (r).

It would seem that the having assets is a good consideration for a promise by an executor or administrator to pay a debt of the deceased. or to answer damages out of the executor's own estate: Thus in *Reech v. Kennegal* (s), Lord Hardwicke observed. "At law, if an executor promises to pay the debt of his

(n) *Forth v. Stanton*, 1 Saund. 210.

(o) *Pitt v. Bridgwater*, 1 Roll. Abr. 20, pl. 11; *Russel v. Haddock*, 1 Lev. 188; 1 Saund. 210, note (1).

(p) *Reynolds v. Prosser*, Hardr. 71; *Oble v. Dittlesfield*, 1 Ventr. 153; 1 Saund. 210, note (1).

(q) *Wheeler v. Collier*, Cro. Eliz. 406.

(r) *Hamilton v. Incledon*, 4 Bro. P. O. 4. Toml. edit.

(s) 1 Ves. Sen. 126.

testator, a consideration must be alleged: *as of assets come to his hands*; or of forbearance; or if an admission of assets is implied by the promise; otherwise it will be but *nudum pactum*, and not personally binding upon the executor." So it was held in *Atkins v. Hill* (t) and in *Hawkes v. Saunders* (u), that the circumstance of the executor having assets sufficient to pay all the debts and legacies, was a sufficient consideration to support a promise to pay a legacy, so as to render the executor individually liable on that promise in an action at law (x): And although the doctrine of these cases, as far as the liability of an executor to be sued at law for a general legacy, has been since exploded (y), yet it would seem that their authority, with respect to the sufficiency of the consideration in question to support a promise to pay debts, remains unimpeached. The consequence is, that if an executor or administrator promises, in writing, that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis* (z).

It may here be observed, that in cases like the above mentioned, where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising *as executor* (a).

It remains to consider 2ndly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth section of the Statute of Frauds (29 Car. II. c. 3), enacts (*inter alia*) that "no action shall be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default or miscarriage of another person, &c., &c., unless the agreement upon which such action shall be brought, or some

what is a sufficient reduction of the executor's promise into writing.

(t) Cowp. 284.

(u) Cowp. 289.

(x) See also accord. *Barnard v. Pumfrett*, 5 M. & Cr. 71, per Lord Cottenham.

(y) See *post*, Pt. v. Bk. II. Ch. I.

(z) *Trewinian v. Howell*, Cro. Eliz. 91. And see *Rann v. Hughes*, 7 Term Rep. 350, note (a).

(a) *Powell v. Graham*, 7 Taunt. 585; *Wigley v. Ashton*, 3 B. & A. 101; *Corner v. Shew*, 3 M. & W. 350.

memorandum or note thereof, shall be *in writing* and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The word "agreement" used in this section means the *consideration* of the promise (*b*): and, therefore, it was held in the case of *Wain v. Warlters* (*c*), that the *consideration* of the promise, as well as the promise itself, must be in writing, otherwise it is void: This doctrine was very much doubted in several subsequent cases, but was fully established by subsequent decisions (*d*). It was, however, sufficient, if the consideration could be gathered from the whole tenor of the writing; and it was held that it was not necessary that it should be stated on the face of it in express terms (*e*). This rule having proved a grievance, it was enacted by stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), s. 3, that no special promise *to answer for the debt, default, or miscarriage of another person*, shall be deemed invalid, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

Personal
responsibility
of executor on
a submission
to arbitration.

This may be the proper place to consider how far an executor or administrator is liable upon a submission to arbitration of a claim upon him as the representative of the deceased. Where the executor submits in broad terms, to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not (*f*): For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission (*g*). Thus in *Barry v. Rush* (*h*), an action of debt was brought on a bond given by the defendant, by which he, as administrator, bound himself, his heirs, &c.: The condition, after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes which had arisen between the plaintiff and the

(*b*) 1 Saund. 211, note (2).

(*c*) 5 East, 10.

(*d*) *Saunders v. Wakefield*, 4 Barn. & Ald. 595; 1 Saund. 211, note (*d*).

(*e*) 1 Saund. 211, note (*d*).

(*f*) See Lord Kenyon's judgment, in *Pearson v. Henry*, 5 Term Rep. 7.

(*g*) By Lord Eldon, in *Robson v. —*, 2 Rose, 50. See also *Wansborough v. Dyer*, 2 Chitt. Rep. 40.

(*h*) 1 Term Rep. 691.

defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator, was for the performance of an award to be made by the arbitrators concerning the matters assigned, and also concerning all other matters, &c., between the said parties: The declaration stated, that the arbitrator had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l.* on the 27th June following, and that the parties should execute general releases: The defendant pleaded *plene administravit*, and that at the time of entering into the bond, he had no assets: To this plea there was a demurrer: And the Court of King's Bench held that the plea was bad; on the ground that the bond was a personal engagement by the defendant to perform the award. So in *Worthington v. Barlow* (*i*), where the arbitrator, under a reference between A., a claimant on the estate of an intestate, and B., the administratrix, ascertained the amount of the demand, and directed that B. should pay it; it was held that B. could not afterwards object that he had no assets, but that he might be attached for nonpayment: And Lord Kenyon said, "The submission to arbitration by the administratrix, was a reference not only of the cause of action, but also of the other question whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining, between these parties, that the administratrix had assets to pay this debt. The defendant, therefore, is concluded by the award, though it will not operate as an admission of assets in any other action to be brought by any other creditor." So in *Riddell v. Sutton* (*k*), an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration: The arbitrator found a balance due from the defendant to the plaintiff, and without finding assets, awarded her to pay it on or before a certain day: And the Court of Common Pleas held that *plene administravit* was no bar to an action on the award. It would seem, however, that on a general reference an arbitrator is not justified in rejecting evidence offered by the executor to show that he has no assets to meet the demand upon his testator's estate (*l*).

(i) 7 Term Rep. 453.

(k) 5 Bing. 200.

(l) Russell on Arbitration and Award, 9th edit., p. 145.

But the personal liability of the executor or administrator may obviously depend not only on the terms of the submission, but also on those of the award. Thus in *Pearson v. Henry* (m), the defendant, as administrator, submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it*: And it was held that the administrator was not thereby precluded from denying that he had assets (n). So in *Love v. Honeybourne* (o), a cause and all matters in difference between the plaintiff's testator and the defendant were referred to arbitration by a Judge's order, and the arbitrator, upon an investigation of the accounts, ascertained that there was a certain balance against the testator, and, by his award, directed the plaintiff to pay that sum *out of the assets*, on or before a certain day: The Court was moved to set aside this award for uncertainty, on the ground that the arbitrator had not ascertained whether there were any assets in the hands of the executor to pay the sum awarded: The Court refused to set aside the award, on the ground that although in that respect it might be uncertain, yet that would not vitiate the other part of the award, which was unquestionably certain, namely, that part which found that the plaintiff, as executor, was indebted, upon a balance of accounts, to the defendant: But Lord Tenterden observed, that it appeared to him, that the latter part of the award did not conclude the question of assets, but left it open: And Holroyd, J., remarked that the arbitrator had awarded that the money should be paid by the plaintiff out of the assets upon a day which he fixed, *i.e.*, if there were any assets in his hands at that time; and that if the plaintiff had fully administered at that time, he would not be bound to pay (p).

Liability of executor for acts done under his power of attorney.

It was held by the Court of K. B. in *Gardner v. Baillie* (q), that a power of attorney from an executor, to ask, demand, sue for and receive all sums due to him as executor, and to do all further acts for receiving debts, &c., with power to do and act touching the premises as effectually as the principal could do, does not authorise the attorney to bind his principal, by accepting bills for debts due from his testator. But in *Howard*

(m) 5 T. R. 6.

(n) See *Worthington v. Barlow*, 7 T. R. 453.

(o) 4 Dowl. & Ryl. 814.

(p) See also *Re Joseph and Webster*, 1 Russ. & M. 486.

(q) 6 T. R. 591.

v. *Baillie* (*r*), the Court of Common Pleas inclined to hold, that a letter of attorney given by an executor to A., enabling him to transact the affairs of the testator, in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable: And clearly, if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill; without resorting to the letter of attorney (*s*).

With respect to the liability of an executor or an administrator for the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party, who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses (*t*). And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained (*u*), yet it would seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given for the funeral of the deceased, he will be thereby bound, after he has become administrator (*x*), to satisfy the charges incurred under such orders (*y*).

Liability of executor with respect to the expenses of the funeral.

A question, however, of some difficulty arises, in cases where the executor or administrator has neither given nor adopted any

Where executor or administrator

(*r*) 2 H. Black. 618.

(*s*) *Ibid*.

(*t*) *Brice v. Wilson*, 8 A. & E. 349, note (*c*); *Corner v. Shew*, 3 M. & W. 350. As to the duties of the executor or administrator in respect of the funeral, see *ante*, pp. 727, 762.

(*u*) See *ante*, p. 314 *et seq*.

(*x*) But the estate of a deceased person is not liable on a contract made by a person, although for the benefit of the estate, unless that person, by subsequently obtaining letters of administration, becomes authorised to bind the estate, and ratifies the contract: *Re Watson*, 18 Q. B. D. 116; 19 Q. B. D. 234. See *ante*, pp. 478, 479.

(*y*) *Lucy v. Walrond*, 3 Bing. N. O. 841. In this case, the action was sustained against the defendant in his character as administrator; but the point, as to whether he could be properly sued otherwise than individually, was precluded by the circumstances of the defendant having paid money into Court.

has neither given nor adopted directions for burial.

directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased. According to one report of the case of *Ashton v. Sherman* (z), Lord Holt laid it down that "if A. employs B. to work for C., without warrant from C., A. is liable to pay for it: an executor is not liable to pay for funeral expenses unless he contracts for it." This *dictum* is not mentioned by the other reporters (a) of the same case; and, indeed, from the nature of the facts, it is difficult to see how the remark could have been introduced into the discussion: But an anonymous case is to be found in the twelfth volume of *Modern Reports* (b), which contains the mere statement that "an executor is not liable to pay for funeral expenses, without he contracts for it:" And this probably is but a reference to the *dictum* of Lord Holt, inserted in the report of *Ashton v. Sherman*. Recent decisions, although the propriety of them has been much questioned (c), must be considered as having overruled this doctrine: and it seems now established, that in the absence of evidence to charge any other individual, an executor *with assets* is answerable in point of law without any express contract, for the funeral expenses of his testator, suitable to his degree (d). Thus in *Tugwell v. Heyman* (e), Lord Ellenborough held, that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. So in *Rogers v. Price* (f), it appeared that the testator died in

(z) Holt, 309.

(a) 1 Lord Raym. 263; Carth. 429; 12 Mod. 153; Comberb. 444, 449.

(b) P. 256.

(c) See *Corner v. Shew*, 3 M. & W. 356.

(d) See the remark of Bayley, J., in *Hancock v. Podmore*, 1 Barn. & Adol. 262; and of Jervis, C. J., in *Ambrose v. Kerrison*, 10 C. B. 779. And Sir G. Jessel, in *Sharp v. Lush*, 10 C. D. 468, 472, said: "It appears to me that the executor is liable to pay the funeral expenses, even without an order on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets. Even if the executor never receives assets to the amount of the funeral expenses, he is liable to pay, although he did not order the funeral. It is part of his official duty to bury the deceased, so that he is liable to pay the funeral expenses without an order." See also *Williams v. Williams*, 20 C. D. 659.

(e) 3 Campb. 298.

(f) 3 Younge & Jerv. 28.

Executor with assets liable without any express contract to pay for funeral expenses in absence of evidence to charge any other person.

Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker residing at a distance: The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner: It was admitted that the funeral was suitable to the degree of the deceased: There was no evidence of any contract made by the defendant, or that he knew of the funeral until it had taken place: But the Court of Exchequer held that, assuming him to have assets, he was liable, upon an implied promise, to pay the expenses of the burial.

However, it was stated by Patteson, J., in *Brice v. Wilson* (*g*), that, "it has been decided by several cases that an executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, *where no other person is liable upon an express contract*, although he does not give orders for it: But there is no case which goes the length of deciding that if the funeral be ordered by another person to whom credit is given, the executor is liable:" In that case the testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant: The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay: An action was brought against the executor in his own right, in which he suffered judgment by default: And it was held that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow; not, it must be observed, on the ground of a common law liability of the defendant as executor, but on the ground of his having rendered himself liable by adopting the acts of the widow, and treating her as his agent (*h*). But the learned judge, in this case, probably intended to lay down no more than that the executor, where credit has been given to another person, is not liable to *the undertaker*; for it would seem, that if the person, who gives the order for the funeral, pays for it, he may have an action against the executor for the reasonable expenses: Accordingly, it was held in *Green v. Salmon* (*i*), that in an action (brought before Lord Denman's Act, making interested witnesses competent) by an undertaker for funeral expenses,

(*g*) 8 A. & E. 349, note (c).

(*h*) See *Walker v. Taylor*, 6 C. & P. 752.

(*i*) 8 A. & E. 348.

against a person not the executor, a residuary legatee was a competent witness for the plaintiff: For although a person, other than the executor, might have rendered himself liable to the undertaker, the estate was ultimately answerable for so much of the cost as an executor might reasonably pay, and no more; and the witness, therefore, had no disqualifying interest (*k*).

These authorities do not involve the decision of the question whether, in an action on the promise implied by law on the part of an executor to pay for the funeral of his testator, the judgment should be *de bonis propriis* or *de bonis testatoris*, or consequently whether *plene administravit* is a good plea: It would seem, however, that the naming the defendant executor in the claim is surplusage, and that he is liable *de bonis propriis*, if liable at all (*l*): but that, since the maintenance of the action is dependent on the fact of his being an executor *with assets*, it is a good defence under the general issue that his testator left none. And accordingly, in *Corner v. Shew* (*m*), the Court of Exchequer held, that the only point really determined, by *Tugwell v. Heyman* and *Rogers v. Price*, was that the law implies a contract on the part of an executor who has assets *personally*, and not in his *representative character*; inasmuch as the implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only.

Liability of executor continuing the trade of testator.

With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is, that a trade is not transmissible, but is put an end to by the death of the trader: Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the Will contains a direction that they should continue the business of the deceased (*n*). The case of an executor or administrator, in this respect, is very hard: For,

(*k*) But an heir-at-law who has voluntarily, and as an act of bounty, paid the funeral expenses of an intestate cannot claim to have them refunded out of the intestate's personal estate: *Coleby v. Coleby*, 12 Jur. N. S. 496, *coram* Stuart, V.-C.

(*l*) See *Hayter v. Moat*, 2 M. & W. 56.

(*m*) 3 M. & W. 350.

(*n*) *Barker v. Barker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. 119. As to the duty of the executor or administrator with regard to the business of the deceased, see *post*, Pt. V. Bk. I. Ch. II.

if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success: If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt though he is but a trustee (*o*). Accordingly, in a case (*p*) where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the Court of K. B. held, that they were liable upon a bill drawn for the accommodation of the partnership and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves (*q*).

It is therefore obvious, that where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally (*r*), though the covenant is binding on the estate of the deceased partner in their hands (*s*).

(*o*) *Ex parte Garland*, 10 Ves. 119; *Ex parte Richardson*, 1 Buck, 209; *Owen v. Delamere*, L. R. 15 Eq. 134; *Fairland v. Percy*, L. R. 3 P. & D. 217; but see *Re Fisher & Sons*, *infra*. As to the remedy of a creditor of the business, see *post*, Pt. V. Bk. II. Ch. II.

(*p*) *Wightman v. Townroe*, 1 M. & S. 412.

(*q*) See also accord. *Labouchere v. Tupper*, 11 Moo. P. C. 198; in which case Lord Justice Knight Bruce further laid down that the executor is personally liable, as above stated, though he carries on the trade avowedly as executor, and whether he is entitled or not entitled to be indemnified out of the testator's personal estate, and whether it is sufficient or insufficient for the purpose, and notwithstanding the testator was bound by a covenant with his partner to continue the trade in partnership. His Lordship also pointed out that the propriety of his executor's conduct, as between himself and those beneficially interested in the testator's personal estate, cannot give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. See further *Re Leeds Banking Company*, L. R. 1 Ch. 231. If a firm in which the Will authorized the employment of the assets becomes bankrupt, no proof can be made against the bankrupt estate in respect of the money so employed: *Scott v. Izon*, 34 B. 434.

(*r*) *Downs v. Collins*, 6 Hare, 418, 438. See *per James, L. J.*, in *Baird's Case*, L. R. 5 Ch. 733; *ante*, p. 1272, note (*o*).

(*s*) *Ibid*. See also *ante*, p. 1363 *et seq.*, as to the executors of

If an executor, without any authority from the Will (*t*), take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests: and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not pass to the assignees; the executor holding them *alieno jure*, they will not be liable to his bankruptcy (*u*).

But executors carrying on their testator's business under a power in the Will and in the name of the firm are not partners and cannot be adjudicated bankrupt as partners, though they may probably be proceeded against as joint debtors (*v*).

Again, the testator may, by his Will, qualify the power of his executor to carry on trade; and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation (*x*). Accordingly, in *Cutbush v. Cutbush* (*y*), where a testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and for that purpose gave her the "entire use, disposal, and management of the capital, stock, and effects which should be in, due, and owing, or belonnging to him in his said

deceased shareholders in Public Companies. If such an executor purchases further shares, he is, of course, personally liable in respect of these: *Spence's Case*, 17 Beav. 203.

(*t*) In *Kirkman v. Booth*, 11 Beav. 273, 280, Lord Langdale said it was a rule without exception that, to authorize executors to carry on a trade, or permit it to be carried on with the assets, there ought to be the most distinct and positive authority and direction given by the Will for that purpose. See further as to what shall constitute such an authority and direction, *Travis v. Milne*, 9 Hare, 141. A power to postpone the sale and conversion of the testator's estate will authorize executors to carry on his trade for any time even if it is not carried on with a view to a sale: *Re Crowther*, [1895] 2 Ch. 56. But see *Re Smith*, [1896] 1 Ch. 171, where a general power to postpone sale, but with a direction to sell business with all convenient speed, was held not to authorize the carrying on the business for an indefinite time.

(*u*) *Ex parte Garland*, 10 Ves. 110; Toller, 487; *Ex parte Richardson*, 1 Buck, 202; *ante*, p. 485.

(*v*) *Re Fisher & Sons*, [1912] 2 K. B. 491.

(*x*) *Ex parte Garland*, 10 Ves. 110; Toller, 487; *Ex parte Richardson*, 1 Buck, 202; *Thompson v. Andrews*, 1 M. & K. 116.

(*y*) 1 Beav. 184.

trade," at the time of his decease, and he authorized his executors to augment the capital employed therein: and, the executors renouncing, the widow took out administration: Lord Langdale, M. R. held that the specified property of the testator only (and not his general assets) was liable to the debts contracted by the widow in carrying on the trade (z).

It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means, that they are not to buy and sell: There are many cases, when executors not only may, but are bound to continue the business to a certain extent: Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work (a). So if a party engages to build a house, and dies, after having procured all the necessary materials, it would seem that his executors ought to complete the work, and not dispose of the materials at a loss to the estate (b). Again, if a bookseller undertakes to publish a work in parts, and before the completion he dies, a subscriber has a claim upon the estate to complete the work; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless: So if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state (c). So if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage; and they will not, at least in equity, be charged with any loss sustained in employing the assets in so continuing the trade, if they act *bonâ fide*, and according to the best of their judgment (d).

It may here be mentioned, that if executors, who are by

(z) A direction in a Will that the testator's trade shall be carried on does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on: *M'Neillie v. Acton*, 4 De G. M. & G. 744.

(a) *Marshall v. Broadhurst*, 1 Cr. & J. 405; *ante*, p. 1335.

(b) 1 Cr. & J. 405. See also *Edwards v. Grace*, 2 M. & W. 190.

(c) 1 Cr. & J. 405. See *Dakin v. Cope*, 2 Russ. Ch. 170.

(d) *Garrett v. Noble*, 6 Sim. 504. See also accord. *Collinson v. Lister*, 20 Beav. 356, 365, 366, by Romilly, M. R.

the testator's Will to carry on his trade for the benefit of his family, suffer a person to conduct the trade in his own name, such person may bring actions in his own name for goods sold by him, though afterwards accountable to the executors (e).

In *Sterndale v. Hankinson* (f), the facts were, that A., the widow and administratrix of B., continued B.'s trade after his decease: B., at his death, was indebted to C. on the balance of an account: A. continued to receive goods from and to make payments to C. as B. had done, and she was charged in account by C. with the debt: The payments made by her to C. exceeded the debt; but a balance was ultimately due to C.; And it was held, applying the principle of appropriation of payments laid down in *Clayton's Case* (g), that B.'s debt was discharged by A.'s payments, and that the ultimate balance could not be proved as a debt against B.'s estate.

SECTION II.

The Liability of an Executor or Administrator in respect of his own tortious or negligent Acts: and herewith of Devastavit; and of Executors' Accounts and Allowances.

It remains to investigate what will amount to such a violation or neglect of duty by an executor or administrator, as will make him personally responsible.

Devastavit.

This species of misconduct is called in law a *devastavit*: that is, a wasting of the assets; and is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased (h).

An executor is personally liable in equity for all breaches of the ordinary trusts which, in Courts of Equity, are considered to arise from his office (i). And it may here be observed, that where personal property is bequeathed to executors, as trustees,

Executor
liable for
breach of
trusts arising
from office.

(e) *Wilkes v. Lister*, 6 Esp. 78.

(f) 1 Sim. 393.

(g) 1 Mer. 572.

(h) Bac. Abr. Exors. (I.) 1.

(i) *Re Marsden*, 26 C. D. 783, 789.

the circumstance of taking probate of the Will (*k*) is, in itself, an acceptance of the particular trusts: Therefore, where the Will contains express directions what the executors are to do, an executor, who proves the Will, must do all that he is directed to do as executor, and he cannot say, that, though executor, he is not clothed with any of those trusts (*l*). Moreover, an executor-trustee of English and foreign property cannot disclaim the trusts of the English property while retaining control over the foreign property (*m*).

Probate by executors is an acceptance of trusts in Will.

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two principles: 1st, That in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight ground: 2nd, That care must be taken to guard against an abuse of their trust (*n*).

Executors and administrators may be guilty of a *devastavit* not only by a direct abuse of the effects of the deceased, as by spending or consuming, or converting them to their own use (*o*),

(*k*) *Ante*, p. 1032. And where probate is granted to one of several executors, the right of the others being reserved, it enures to the benefit of all, and a slight act of intermeddling by the executor, who has not joined in proving the Will, will amount to the acceptance of the office of executor: *Cummins v. Cummins*, 3 J. & L. 64; 8 Ir. Eq. Rep. 723. And where one appointed executor intermeddled with the estate of the testator and afterwards renounced, it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will: *Rogers v. Frank*, 1 Y. & J. 409. So, too, where two out of three executors proved the Will, and the third, who did not prove, administered part of the assets, and, as purchaser, paid the purchase-money of the stock in trade to one of the other two executors who misapplied the money, it was held that he was liable as executor, being by his conduct completely executor: *Kilbee v. Sneyd*, 2 Moll. 186.

(*l*) *Mucklow v. Fuller*, Jacob. 198; *Booth v. Booth*, 1 Beav. 125; *Stiles v. Guy*, 4 Y. & Coll. 571, 575; *Williams v. Nixon*, 2 Beav. 472. But where the same persons are appointed trustees and executors of a Will, a revocation by the testator of their appointment as executors is not necessarily a revocation of their appointment as trustees: *Graham v. Graham*, 16 Beav. 550; *Cartwright v. Shepherd*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58.

(*m*) *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228.

(*n*) *Powell v. Evans*, 5 Ves. 843; *Raphael v. Boehm*, 13 Ves. 410; *Tebbs v. Carpenter*, 1 Madd. 298.

(*o*) A disposing of the goods of the testator to the executor's own use is no *devastavit*, if he pays the testator's debts to the value, with his own money, in such order as the law appoints: *Merchant v. Driver*, 1 Saund. 307; Com. Dig. Admon. (I. 2); *ante*, p. 492. No action will lie for neglect to take out probate, though such neglect

but also by such acts of negligence and wrong administration, as will disappoint the claimants on the assets (*p*).

Devastavit by direct acts of abuse:

With respect to incurring the charge by plain and palpable acts of abuse, an example of this sort of *devastavit* may be afforded by recurring to a subject already considered: *viz.*, the application of the assets to the satisfaction of the executor's own debt to a third party (*q*). So where the executor collusively sells the testator's goods at an under-value, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value (*r*).

by mal-administration.

With regard to a *devastavit* arising from the mal-administration of the executor or administrator, the charge will be incurred by misapplying the assets in undue expenses for the funeral (*s*); in the payment of debts out of their legal order, to the prejudice of such as are superior (*t*); or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors (*u*).

Devastavit in paying debts of inferior degree before debts of superior degree.

As to distribution of assets of testator or intestate after notice given by executor or administrator.

It is not, however, a *devastavit* in an executor or administrator to pay a debt of an inferior degree, before one of higher, of which he had no notice (*x*). The modern authorities appear to establish that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse the executor from the payment or satisfaction of it, if the assets were originally sufficient for that purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he may have handed over the assets *bonâ fide* to legatees or parties entitled in distribution. But an executor or administrator can now protect himself by taking the proper steps, under stat. 22 & 23 Vict. c. 35, s. 29 (*y*),

has been followed by loss, *per* Vaughan Williams, L. J., in *Re Stevens*, [1898] 1 Ch. 162, 177.

(*p*) Bac. Abr. Exors. (L.) 1.

(*q*) See *ante*, p. 698.

(*r*) Wentw. Off. Ex. 302, 14th edit.; Bac. Abr. Exors. (L.) 1; *Rice v. Gordon*, 11 Beav. 265.

(*s*) *Ante*, p. 728 *et seq.*

(*t*) *Ante*, p. 762 *et seq.* But if the executor pays an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it would seem that it will not be a *devastavit*: for the property of the assets will not be changed thereby, but they remain, as against a creditor of a debt of a superior degree, in the same plight as they were before: Com. Dig. Admon. (I. 2); *Wheatley v. Lane*, 1 Saund. 218, by Pemberton, *arguendo*.

(*u*) *Ante*, p. 1077.

(*x*) See *ante*, p. 791.

(*y*) See *ante*, p. 1082.

If the executor surrenders, or otherwise fails to preserve the residue of a term of years, where the land is of greater yearly value than the rent, it is a *devastavit* (z). On the other hand, if the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease by assigning it to some other person (a). If a term be assigned by an executor in trust to attend the inheritance, he is liable to the creditors for a *devastavit*; for the term has by this means ceased to be assets at law (b).

The law formerly pressed very hardly on executors and administrators who, in the exercise of an honest discretion, released or compounded debts due to the testator or intestate. The hardship has been much mitigated by legislation, first by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 30, then by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which repealed the above-mentioned section of Lord Cranworth's Act, and by sect. 37 afforded a still larger relief to executors, but did not extend to administrators (c), and, lastly, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), by the 21st section of which it is enacted that—

“(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.”

“(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise (d), compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and

Distinction between executors and administrators as to releasing or compounding debts.

Executor or administrator may now compound or release debts. 56 & 57 Vict. c. 53, s. 21.

(z) Wentw. Off. Ex. c. 13, p. 312, 14th edit.; *Thompson v. Thompson*, 9 Price, 476.

(a) *Rowley v. Adams*, 4 M. & Cr. 534, *ante*, p. 1369, note (c).

(b) *Charlton v. Low*, 3 P. Wms. 330. As to terms attendant on the inheritance of the testator, see *ante*, p. 1288.

(c) *Re Clay and Tetley*, 16 C. D. 3.

(d) An executor may, in a proper case, compromise a claim by his co-executor against the estate, and such a compromise will bind the residuary legatees: *Re Houghton*, [1904] 1 Ch. 622. See *ante*, p. 403, note (g).

for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith."

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained."

"(4.) This section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act."

This legislation renders the old cases valueless.

Devastavit by unnecessary payments:

An executor will be guilty of a *devastavit*, if he applies the assets in payment of a claim which he is not bound to satisfy (e): as if he makes disbursements in the schooling, feeding, or clothing of the children of the deceased, subsequently to his decease (f). But executors must be allowed a reasonable time for breaking up a testator's domestic establishment and discharging his servants (g). Again, where the testator had been attended for many years by a physician without any fees, and the executors had paid him 100*l.* and he had stated in an affidavit, that the testator had promised to pay him for his services or leave him an equivalent, it was held, that as the physician could not have claimed himself as for a legal debt, the executors, who had taken on themselves to pay him, stood in the same situation as he did; and the payment thereof could not be allowed (h). So if an executor pays a bond *ex turpi causâ* or,

(e) Com. Dig. Admon. (I. 1); *Manning v. Purcell*, 7 De G. M. & G. 55; *Vez v. Emery*, 5 Ves. 141. In this last case, Lord Alvanley said, that if the executor had taken advice as to the propriety of making the payment, and had been advised by any gentleman of the law in this country, that he was bound to do so, he (the learned Judge) would not have held him liable. However, the general rule is, that, if, under the best advice he can procure, an executor acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer: if he has been misadvised, the Court must act, not upon the improper advice under which he may have acted, but upon the acts he has done: *Doyle v. Blake*, 2 Sch. & Lef. 243; *National Trustees Co. v. General Finance Co.*, [1905] A. C. 373. But executors acting under advice will not readily be deprived of costs: *Re Buckton*, [1907] 2 Ch. 406, 414.

(f) *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(g) *Field v. Peckett*, 29 Beav. 576, where two months was held not to have been an unreasonable time having regard to the circumstances.

(h) *Shallcross v. Wright*, 12 Beav. 558. Such a case, however, would

formerly, a bond founded on a usurious contract, such payment will amount to a *devastavit*, as well against legatees as creditors (*i*). So if the testator was bound in a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument, and therefore if he pays the sum due upon it, he will be guilty of a *devastavit* (*k*): However, in equity, the executor is in some instances chargeable *pari passu* with the survivor; and in such cases he is justified in applying the assets accordingly (*l*). But an executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations (*m*). Again, it has been held that he is not bound to plead the statute to an action commenced against him by a creditor of the testator (*n*): Thus if the surplus of the personal estate, after payment of the debts and legacies, be bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favour of the residuary legatee (*o*).

effect of
Statute of
Limitations:
executor not
bound to
plead the
statute:

now be within s. 21 of the Trustee Act, 1893: see *ante*, p. 1419. In the same case, a payment was allowed which the executors had made in respect of the loss of the furniture of the house of a friend where the testator had died of malignant fever, and which had been destroyed, under medical advice, to prevent infection. As to the liability of an executor to pay for work done or services rendered *under the expectation* of a legacy, see *ante*, p. 1390.

(*i*) *Winchcombe v. Bishop of Winchester*, Hobart, 167; *Robinson v. Gee*, 1 Ves. Sen. 254; Com. Dig. Admon. (I. 1), *ante*, p. 784.

(*k*) *Ante*, p. 1352.

(*l*) *Ante*, p. 1357.

(*m*) *Norton v. Frecker*, 1 Atk. 526, by Lord Hardwicke; *Stahlschmidt v. Lett*, 1 Sm. & G. 415. The reason for this is that the Statute of Limitations does not make the contract void, but only bars the remedy. Whereas an executor or administrator would commit a *devastavit* if he paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, or if he retains such a debt due to himself: *Re Rowson*, 29 C. D. 358. An executor may not, however, pay a debt which has been judicially declared to be barred by the Statute of Limitations: *Midgley v. Midgley*, [1893] 3 Ch. 282. It seems doubtful whether an executor may pay a statute-barred debt against the declared wish of his co-executors: *S. C.* An acknowledgment of a debt within Lord Tenterden's Act by one of several executors, as executor, binds the estate, even after his death: *Re Macdonald*, [1897] 2 Ch. 181.

(*n*) *Williamson v. Naylor*, 3 Y. & Coll. 211, note (*a*), by Lord Lyndhurst. But see *contra*, by Bayley, J., in *McCulloch v. Dawes*, 9 D. & R. 43. This dictum of the latter judge was disapproved by Wood, V.-C., in *Hill v. Walker*, 4 Kay & J. 166; *Lewis v. Rumney*, L. R. 4 Eq. 451.

(*o*) *Castleton v. Fanshaw*, Prec. Ch. 100; *S. C.*, 1 Eq. Cas. Abr. 305; 2 Eq. Cas. Abr. 254, 259, pl. 1. But see *Re Wenham*, [1892] 3 Ch. 59, *post*, p. 1423.

So in the administration of assets under a creditor's bill, it was held, that executors were not bound to plead the statute; and if they did not, the creditor filing the bill would have a decree on behalf of himself and all other creditors, and would be paid (*p*). And accordingly, on a creditor's administration summons, if the executor does not set up the statute, the residuary legatees cannot set it up against the plaintiff, whatever may be their right as to other creditors (*q*). But in *Shewen v. Vandenhorst* (*r*), under the common decree in an administration suit, where the bill had been filed, and the decree obtained, by the residuary legatee, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff insisted upon setting up the objection of the statute: Sir John Leach, M. R., held, that it was competent for the plaintiff, or any other person interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executor: And this decision was confirmed by Lord Brougham on appeal (*s*). And even on a creditor's administration summons, the *cestuis que trustent* of devised estates may set up the statute against him, though the executor should decline to do so; for they would have been necessary parties to the suit, but for the Chancery Amendment Act, and might have set up the statute by answer (*t*).

If an action is brought against several executors for the recovery of a debt due from their testator, and they plead different inconsistent pleas, that plea is to be enforced by the Court which is most for the benefit of the estate (*u*).

After judgment or order for administration an executor cannot exercise any discretion at all or do any act to vary the rights of the parties, and he cannot therefore give an acknow-

(*p*) *Ex parte Dewdney*, 15 Ves. 498.

(*q*) *Briggs v. Wilson*, 5 De G. M. & G. 12. See also *Fuller v. Redman*, 26 Beav. 614.

(*r*) 1 Russ. & M. 347; 2 Russ. & M. 75; and see *Re Fleetwood, &c.*, [1915] 1 Ch. 488.

(*s*) See also *Moodie v. Bannister*, 4 Drewr. 432; *Fuller v. Redman*, 26 Beav. 614.

(*t*) *Briggs v. Wilson*, 5 De G. M. & G. 12; See *Re Lacey*, [1907] 1 Ch. 330. See also *Beeching v. Morphew*, 8 Hare, 129, where it was held, that in a creditor's bill against a husband and wife for a payment out of an estate of which the wife was administratrix, she alone might set up the statute in their joint answer. But where judgment has been recovered against an executor for a debt due by the testator, the statute cannot afterwards be set up in an administration suit: *Hunter v. Baxter*, 3 Giff. 214.

(*u*) *Midgley v. Midgley*, [1893] 3 Ch. 282.

ledgment to take a debt out of the Statute of Limitations (*v*). But nothing short of an order for administration will prevent a creditor of the estate from suing the executor, or the executor from paying a debt due from the estate. An order in an administration action under Ord. XV. r. 1, merely for an account by an executrix, and reserving further consideration, does not affect the right of creditors to sue her or her right to prefer creditors (*x*). An originating summons under R. S. C., Ord. LV. r. 3, is, however, only a less expensive way of effecting the same thing as an administration action, and therefore where executors took out a summons asking for the determination, without administration of the estate, of the question whether the first defendant was a creditor upon the estate to any and (if so) what amount, the other defendant being the residuary legatee, it was held that the residuary legatee was entitled to insist on the statute being set up as a defence to the claim (*y*). But after decree in an administration suit, the Court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the statute if the personal representative and such of the persons beneficially interested as are parties to the suit or have come in under the decree do not set up the statute (*z*).

If before judgment or order it is desired to prevent waste, the Court will grant *interim* relief by appointing a receiver, but it will not interfere to prevent the executor or administrator preferring one creditor to another, nor to prevent the exercise of a right of retainer, nor in any case where it is not alleged that assets are being wasted (*a*).

Although it has been established as a general rule that an executor may pay a debt barred by the statute without being guilty of a *devastavit*, yet he may not pay such a debt after it has been judicially declared by the Court of competent jurisdiction that it is barred by the statute (*b*).

So where there has been no acknowledgment in writing by trustees within s. 42 of the Limitation Act, 1833, for six years before the commencement of proceedings, it is not compe-

(*v*) *Phillips v. Beal*, 32 Beav. 26.

(*x*) *Re Barrett*, 43 C. D. 70.

(*y*) *Re Wenham*, [1892] 3 Ch. 59.

(*z*) *Alsen v. Trellope*, L. R. 2 Eq. 205.

(*a*) *Re Wells*, 45 C. D. 569; *and ante*, p. 801. See also *per Chitty*, L. J., in *Re Stevens*, [1898] 1 Ch. 162, 173.

(*b*) *Midgley v. Midgley*, [1893] 3 Ch. 282.

cannot exercise his discretion.

tent for them by any admission to alter the rights of the parties (c).

Devastavit by negligence:

Such acts of negligence, or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit*. For if persons accept the trust of executors, they must perform it: they must use due diligence, and not suffer the estate to be injured by their neglect (d). Thus if an executor has a lease for years, determinable upon the life of A., which is upon a reasonable estimate worth 200*l.*, if the executor will not sell this but keeps it, and A. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator; for it was his own fault that he would not sell it (e). So if an executor delays the payment of a debt payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately (f). And where the executor permits debts carrying interest at a specified rate to run on when he has in his hands a fund to pay them, he will be charged with interest at that rate (g).

in not paying debts carrying interest:

Again, if the executor, by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a *devastavit* (h). So where the testator had lent out money on bond, and the executor in the course of several years made one application,

(c) *Re Turner*, [1917] 1 Ch. 422.

(d) *Tebbs v. Carpenter*, 1 Madd. 298. See *Eaves v. Hickson*, 30 Beav. 136, where trustees were held liable who had paid over the trust fund to wrong persons, trusting to a forged marriage certificate. See also *Hopgood v. Parkin*, L. R. 11 Eq. 74, where a trustee was held liable for a loss of a trust fund, occasioned by the negligence of his solicitor. This case, however, was questioned by the Court of Appeal in *Speight v. Gaunt*, 22 C. D. 727.

(e) *Phillips v. Phillips*, 2 Freem. 12; *Taylor v. Tabrum*, 6 Sim. 281. See *ante*, p. 1283; *Fry v. Fry*, 27 Beav. 144. But see also *Selby v. Bowie*, 4 Giff. 300.

(f) *Seaman v. Everard*, 2 Lev. 40; Com. Dig. Admon. (I. 1); Bac. Abr. Exors. (L.) 1. So if an executor may save the penalty of a bond by payment of the less sum specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a *devastavit* in him if he have assets: 1 Saund. 333, *a*, note (7) to *Hancock v. Proud*.

(g) *Hall v. Hallet*, 1 Cox, 134, 138; *Dornford v. Dornford*, 12 Ves. 130, note (29), 2nd edit. See also *Bate v. Robins*, 32 Beav. 73. See *post*, p. 1471 *et seq.* as to charging executors with interest.

(h) By Holt, C. J., in *Hayward v. Kinsey*, 12 Mod. 573. But see *East v. East*, 5 Hare, 348.

in not getting debts in.

by an attorney, to the obligor, but brought no action against him, Lord Thurlow held, that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear whether the debt was or was not recoverable (*i*). So where, for more than three years, the executors permitted money to remain due on bond to their testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, Lord Alvanley held, that, on the obligor's becoming bankrupt, the executors were responsible (*j*). So where executors had suffered rent to be in arrear for several years, without taking any legal steps, by distress or otherwise, Sir Thomas Plumer held, that they should be charged with such arrears (*k*). And it was held by Lord Cottenham, that executors are equally chargeable with neglect in allowing a part of the assets to remain outstanding in an improper state of investment, whether the person in whose hands it is so outstanding be a co-executor or a stranger; and notwithstanding the Will contains the usual indemnity clause (*l*).

There has been occasion to discuss, in a previous part of this Work(*m*), the question of the liability of an executor or administrator, in respect of assets come fully into his possession and hands, and afterwards lost to the estate. It was there stated that an executor or administrator has been considered to stand in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged without some

Devastavit by
loss of the
assets:

(*i*) *Lowson v. Copeland*, 2 Bro. Ch. Cas. 156. In *Clack v. Holland*, 19 Beav. 271, 272, Romilly, M. R., said that where it is the duty of an executor to obtain payment of a sum of money, he is exonerated, though he has taken no steps at all, provided it appears that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual. But in such a case it would seem that the onus is on the executor, to prove that, if he had taken proper measures to obtain payment, they would have failed: *Stiles v. Guy*, 16 Sim. 230; 1 Mac. & G. 422. In such cases relief will be given under sect. 3 of the Judicial Trustees Act, 1896: *Re Roberts*, 76 L. T. 479; *Re Grindey*, [1898] 2 Ch. 593.

(*j*) *Powell v. Evans*, 5 Ves. 839. See also *Att.-Gen. v. Higham*, 2 Y. & Coll. Ch. C. 634, and *post*, p. 1440.

(*k*) *Tebbs v. Carpenter*, 1 Madd. 290. See *Buxton v. Buxton*, 1 Mylne & Cr. 95, by Sir C. Pepys, M. R., *post*, p. 1441; *Ratcliffe v. Winch*, 17 Beav. 217.

(*l*) *Stiles v. Guy*, 16 Sim. 230; 1 Mac. & G. 422, *post*, p. 1441. See also *Mucklow v. Fuller*, Jacob. 198; *Stiles v. Guy*, 4 Y. & Coll. 571; *Dix v. Burford*, 19 Beav. 409. But see *Paddon v. Richardson*, 7 De Gex, M. & G. 563; and *Re Godwin*, 87 L. J. Ch. 645.

(*m*) *Ante*, p. 1282.

at law:

default in him. But this, as it appears from the judgment of Lord Ellenborough, in *Crosse v. Smith* (*n*), as the law then stood, must not be understood of the extent of the liability of an executor or administrator at law, but merely in equity: His Lordship there observed that it had been suggested in argument, that an executor was to be considered as a mere ordinary bailee; but that this was an idea probably then for the first time suggested in a Court of Law (*o*): "As no case in law," continued the learned Judge, "has yet decided that an executor once become fully responsible, by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part (*p*), I say as no such case in respect to executors has yet occurred in a Court of Law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favour of this defendant."

in equity:

However, a more lenient doctrine was established in the Courts of Equity (*q*), as will fully appear in the course of this section.

loss by theft
or casualty:

Thus, if any goods of the testator are stolen from the possession of an executor, or from the possession of a third person, to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire (*r*),

(*n*) 7 East, 258.

(*o*) See, however, *Wentw. Off. Ex.* 235, 14th edit.

(*p*) But see *Wentw. ubi supra*; *Com. Dig. Assets* (D.); *ante*, p. 1282.

(*q*) See the judgment of Lord Eldon in *Massey v. Banner*, 1 Jac. & Walk. 248.

(*r*) *Croft v. Lyndsey*, 2 Freem. 1. It seems that executors are not bound either to insure or to continue the insurance of their testator: *Bailey v. Gould*, *coram* Alderson, B., 4 Y. & Coll. 221; *Fry v. Fry*, 23 Beav. 146; *Re McEacharn*, 103 L. T. 900. By sect. 18 of the Trustee Act, 1893, replacing sect. 7 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is enacted that, (1) "A trustee [which, by sect. 50, includes the duties incident to the office of personal representative of a deceased person] may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the

the executor shall not, in equity, be charged with these as assets. The principle is that a bailee is not liable for the consequences of such an accident where all reasonable care has been taken (*s*). But it would be otherwise if the loss arose through the wilful default of the executor. For instance, if through his default title deeds are lost or destroyed, he will be liable to an action to establish the contents thereof, and to make compensation for any damage done to the estate by such loss or destruction in addition to the costs of procuring attested and office copies (*t*). But it would seem that the Court will refuse to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it from the absence of the deeds (*u*).

And now since by virtue of the Judicature Act, 1873, sect. 25, sub-sect. 11, where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail, it follows that where the assets of a testator have come into the possession of an executor and are afterwards lost to the estate the rule of law as well as of equity now is that the executor stands in the position of a gratuitous bailee and therefore cannot be charged without some wilful default (*x*).

Again, where an executor puts out the money of his testator, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good (*y*). loss by
invalid
security:

consent of any person who may be entitled wholly or partly to such income.

(2) "This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested so to do.

(3) "This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust."

(*s*) *Jones v. Lewes*, 2 Ves. Sen. 240; *Brown v. Sewell*, 11 Hare, at p. 52.

(*t*) *Hornby v. Matcham*, 16 Sim. 325. As to forms of declarations and orders relating to lost instruments, see Seton, 7th edit. Vol. III. p. 2226.

(*u*) *Brown v. Sewell*, 11 Hare, 49, and see also *Gillian and Nugent v. National Bank, Ltd.* (1901), 2 I. R. 513.

(*x*) See *Job v. Job*, 6 C. D. 562; *Re Gunning*, [1918] 1 Ir. R. 221.

(*y*) *Brown v. Litton*, 1 P. Wms. 141; but see *Norbury v. Norbury*,

After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the Court, and the Judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees (z).

The rule is, never to permit a trustee or executor *after a decree* to account, to lay out money on mortgage, or to deal with the assets for the purposes of investment, without the leave of the Court: Where, therefore, the executor, after a decree, and consequently after he might have had the directions of the Court, chooses to lay out the money on mortgage, if the transaction should appear to be for the benefit of the party entitled, the Court will give him the advantage of it; but if otherwise, will consider the fund as money, and make the executor bring it into Court (a).

loss by loans
on personal
security:

With respect to loans upon personal security, the Court of King's Bench, in *Webster v. Spencer* (b), was of opinion that an executor who had lent out, on the security of a promissory note, money belonging to the testator, but not wanted for the immediate uses of the Will, was not guilty of a *devastavit*, provided he exercised a fair and reasonable discretion on the subject (c). Nevertheless, although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty

4 Madd. 191. On the general question as to the precautions which an executor ought to take, and the extent to which he may properly lend, with reference to the value of the property to be mortgaged, see *Stickney v. Sewell*, 1 M. & Cr. 8, 15; *Macleod v. Annesley*, 16 Beav. 600; *Phillipson v. Gatty*, 7 Hare, 516; *Farrar v. Barraclough*, 2 Sm. & G. 231, 235; *Ingle v. Partridge*, 34 Beav. 411; *Learoyd v. Whiteley*, 12 App. Cas. 727. The provisions of the Trustee Act, 1893, ss. 8 and 9, as to the duties, powers, and liability of executors and administrators in lending money of the testator or intestate on real security, are set out on pp. 1436, 1437, *post*.

(z) *Bethell v. Abraham*, L. R. 17 Eq. 24; cf. *Berry v. Gibbons*, L. R. 8 Ch. 747.

(a) *Widdowson v. Duck*, 2 Meriv. 494, 498, 499.

(b) 3 B. & Ald. 360.

(c) In this case, one of two executors had lent the money in question on the promissory note, and the question was whether both the executors were properly joined as plaintiffs in an action to recover it. It was assumed that if the loan had been a *devastavit*, the executor who was the lender ought to have sued alone in his individual character. But see the observations of Bayley, J., in *Clarke v. Hougham*, 2 B. & C. 155, *ante*, pp. 661, 662.

of a breach of trust (*d*), and shall be personally answerable if the security prove defective.

If, however, the Will directs the executors to lay out the fund in real or personal securities, they would be justified, as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest (*e*): But the rule is different, it would seem, as against creditors (*f*): And though the Will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to *accommodate* a trader with a loan on his bond (*g*).

It must further be observed, that where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all, with respect to the solvency of the borrowers: If one of them lends to the other, this object is defeated: consequently, such a loan is a breach of trust, and a misappropriation of the fund; and if any mischief arises to the estate of the testator therefrom, the executors will be liable (*h*). Accordingly, in *Stickney v. Sewell* (*i*), two executors were empowered, by Will, to lend money on government, real, or personal security: One of them, in 1815, lent part of the fund to the other executor and his partner in trade upon mortgage: The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted in part of a windmill, a water-mill, and a house in a town, being sold, produced considerably less than the sum advanced: And

loss from
loans to each
other:

(*d*) *Terry v. Terry*, Prec. Chanc. 273; *Ryder v. Bickerton*, 3 Swanst. 80, note; *S. C.*, 1 Eden, 149, note; *Adye v. Feuillateau*, 1 Cox, 24; *S. C.*, 3 Swanst. 84, note; *Holmes v. Dring*, 1 Cox, 1; *Wilkes v. Steward*, Coop. 6; *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 63, overruling *Harden v. Parsons*, 1 Eden, 145; *Bacon v. Clark*, 3 My. & Cr. 294; *Clough v. Bond*, *ibid.* 490, 496; *Bullock v. Wheatley*, 1 Coll. 130. But see *Re Grindey*, [1898] 2 Ch. 593, where sect. 3 of the Judicial Trustee Act, 1896, was applied to relieve the executors from their breach of trust and personal liability.

(*e*) *Forbes v. Ross*, 2 Cox, 116; and see *Re Godwin*, 87 L. J. Ch. 645, where the trustees were authorised to retain a promissory note.

(*f*) See *Doyle v. Blake*, 2 Sch. & Lef. 239, 240.

(*g*) *Langston v. Ollivant*, Coop. 33. See further, as to *devastavit* by suffering money to remain in the hands of bankers, &c., which, according to the directions of the trust, should have been invested in a particular mode: *Bacon v. Clark*, 3 My. & Cr. 294; *Loury v. Fulton*, 9 Sim. 115.

(*h*) — *v. Walker*, 5 Russ. 7; *Gleadow v. Atkin*, 2 Cr. & J. 548, 555. But if the one should give a bond to the other, to save him harmless from the consequences of such a breach of trust, the bond would be valid at law: *Warwick v. Richardson*, 10 M. & W. 284.

(*i*) 1 My. & Cr. 8.

it was held by Sir C. Pepys, M. R., that the executors were liable for the deficiency.

loss by fall
of stocks;

An executor is not justified in unnecessarily keeping his testator's money dead in his hands (*k*): and, therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in investments authorized by statute for that purpose (*l*). The rule is that if an executor lays out the testator's money in such investments, he is not liable for the fall of stocks (*m*). But if he invests it in any other fund, which afterwards sinks in value, the loss will be thrown on him, although there be no *mala fides* on his part (*n*). On the other hand, if any profit happen by the risk of the stock in which the executor had laid out the money, he shall not have the benefit, but it shall accrue to the estate of his testator (*o*).

by not in-
vesting in
the autho-
rized funds:

If a testator die leaving investments other than those authorized by Act of Parliament, and has not specifically bequeathed them, it is the duty of the executor (in the absence

(*k*) See *post*, p. 1439.

(*l*) *Holland v. Hughes*, 16 Ves. 114; *Tebbs v. Carpenter*, 1 Madd. 306; *Norbury v. Norbury*, 4 Madd. 191. Where a trustee has trust money in his hands, which he is authorised to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing an anticipated mortgage, in investing the money in Exchequer Bills: *Matthews v. Brise*, 6 Beav. 239.

(*m*) *Peat v. Crane*, 2 Dick. 499, note; *Franklin v. Frith*, 3 Bro. Chanc. Cas. 434; *Howe v. Lord Dartmouth*, 7 Ves. 150; *White & Tudor's Leading Cases*, 7th edit. Vol. II. p. 644. So if he invests money in the Three per Cents., and *duly* appropriates the same for the benefit of a legatee, the executor shall not be liable for the fall of stocks: *Ex parte Champion*, cited in *Hutcheson v. Hammond*, 3 Bro. Chanc. Cas. 147; *Fonbl. Treat. Eq. B. 2, c. 7, s. 6*, note (*p*). But it is otherwise where the appropriation is unduly made. Thus, where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at three per cent.; and the executrix laid out a sum equal to the legacy, and conveyed to trustees in trust to pay the legacy with three per cent. interest, and to pay the surplus interest to her; it was holden that this was not a good appropriation, and, the stocks having fallen in value, that the executrix's estate should make it good: *Cooper v. Douglas*, 2 Bro. Chanc. Cas. 232. See *ante*, p. 1132.

(*n*) *Hancom v. Allen*, 2 Dick. 498; *Howe v. Lord Dartmouth*, 7 Ves. 150; *Clough v. Bond*, 3 My. & Cr. 497. See also *Gordon v. Bowden*, 6 Madd. 342. He was not answerable for any further loss than was occasioned by his buying the other stock instead of the Three per Cents.: *Hynes v. Redington*, 1 J. & L. 589. It may be doubted whether, where trustees had the power of investing moneys in Government securities, they were even before the passing of the Acts of Parliament hereinafter referred to, absolutely bound to select Three per Cents. for that purpose: see *Angell v. Dawson*, 3 Y. & Coll. 316, *per* Alderson, B.; *Robinson v. Robinson*, 1 De G. M. & G. 255, 256, by Lord Cranworth; but see *Re Hollins*, [1918] 1 Ch. 503.

(*o*) *Phayre v. Peree*, 3 Dow. 128.

of express authority in the Will to retain the same) to convert them and invest the proceeds in authorized investments (*p*).

Formerly the only fund in which an executor might properly invest the unemployed money of the testator was the 3*l.* per cent. consols, *i.e.*, the fund adopted by the Court of Chancery, and an executor investing in such security was held by the Court not to be liable for any fall which might take place, although if he invested in any other fund which afterwards sank in value he was held liable for such depreciation even in the absence of any *mala fides* on his part. But now the class of investments authorized for trust funds has been considerably enlarged, and the trustee or executor investing in any of the authorized funds will not be responsible for any fall in value.

Most of the provisions now in force for authorizing these investments are contained in the Trustee Act, 1893 (56 & 57 Vict. c. 53) (*q*), which enacts:—Sect. 1. “A trustee (*r*) may, unless expressly forbidden (*s*) by the instrument (if any) creating the trust, invest any trust funds in his hands (*t*), whether at the time in a state of investment or not, in manner following, that is to say:—

Authorized
trust invest-
ments:
Trustee Act,
1893.

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:

(b) On real or heritable securities in Great Britain or Ireland: (*u*).

(*p*) See *ante*, p. 1121 *et seq.*

(*q*) Extended by the Colonial Stock Act, 1900.

(*r*) By sect. 50, the expressions “trust” and “trustee” include the duties incident to the office of personal representative of a deceased person.

(*s*) See *Re Hill*, [1914] W. N. 132; *Re Burke*, [1908] 2 Ch. 248.

(*t*) This power of investment does not extend to authorizing trustees to set apart or appropriate any of such stocks to answer a particular purpose, *e.g.* to provide for an annuity given by Will, so as to facilitate the distribution of the testator's estate: *Re Owthwaite*, [1891] 3 Ch. 494, decided under the Trust Investment Act, 1889.

The words “trust funds in his hands” were under the Trust Investment Act, 1889, held to include all trust funds in the hands of the trustee, whether at the time in a state of investment or not: *Hume v. Lopes*, [1892] A. C. 112, affirming the decision of the Court of Appeal in *Re Dick*, [1891] 1 Ch. 423. The effect of this decision has been incorporated into the Trustee Act, 1893.

(*u*) See sect. 9 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), which provides that: “A power to invest trust money in real securities shall authorize and be deemed to have always authorized an investment upon mortgage of property held for an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.”

- (c) In the stock of the Bank of England or the Bank of Ireland:
- (d) In India Three and a half per cent. Stock, and India Three per cent. Stock or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India:
- (e) In any securities the interest of which is for the time being guaranteed by Parliament:
- (f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:
- (g) In the debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:(v).
- (h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company;
- (i) In the debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India:
- (j) In the "B." Annuities of the Eastern Bengal, the East Indian and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised

(v) See, however, sub-sect. (o) and R. S. C. Ord. XXII. r. 17. See also Lewin on Trusts, 12th ed. 353.

in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

- (k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:
- (l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:
- (m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the return of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order: (*w*)
- (n) In nominal or inscribed stock issued, or to be issued, by any commissioners incorporated by Act of Parliament (*x*) for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:
- (o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court: (*y*)

and also from time to time to vary any such investment" (*z*).

(*w*) See as to this sub-section, *Re Druitt*, [1903] 1 Ch. 446. Cf. also sect. 5 (3) of the Act, set out below, and the note in *Wolst. Conv. Acts*, 10th ed. 249.

(*x*) See *Re Smith*, [1896] 2 Ch. 590.

(*y*) See R. S. C. 1883, Ord. XXII. r. 17.

(*z*) These words are not confined to investments made under the

Purchase at a premium of redeemable stocks.

Sect. 2. (1.) "A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in sect. 1 of the Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) "Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sects. (g), (i), (k), (l), and (m), of sect. 1, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) "A trustee may retain until redemption, any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act."

Discretion of trustees.

Sect. 3. "Every power conferred by this Act shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds."

Sect. 4. "The preceding sections shall apply as well to trusts created before, as to trusts created after, the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust" (a).

Enlargement of express powers of investment.

Sect. 5. (1.) "A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

- (a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent; and

Act, but extend to any investment, whenever made, upon any such stocks, funds, or securities, as are mentioned in the section: *Re Dick*, [1891] 1 Ch. 423 (decided under the Act of 1889); affirmed in the House of Lords, *sub nom. Hume v. Lopes*, [1892] A. C. 112.

(a) There are many local Acts of Parliament (such, for instance, as the Metropolis Water Act, 1902) which contain express provisions authorising trustees to invest in the stocks and debentures thereby authorised to be created.

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2.) "A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3.) "A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875 (b).

(4.) "A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(5.) "A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865."

Sect. 6. "A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge" (c).

Power to invest, notwithstanding drainage charges.

(b) *Re Tattersall*, [1906] 2 Ch. 399.

(c) An investment on a second mortgage of land in England is a breach of trust: *Chapman v. Browne*, [1902] 1 Ch. 785, per Romer. L. J., at p. 800; *Re Newland*, W. N. (1904) 181. It has been decided in Ireland that a loan of trust funds on a second mortgage of land in Ireland is not of itself, and in the absence of other circumstances, a breach of trust: *Smithwick v. Smithwick*, 12 Ir. Ch. Rep. 181; *Crampton v. Walker*, 31 L. R. Ir. 437; but see *Chapman v. Browne*, *ubi supra*.

Trustees not
to convert
inscribed
stock into
certificates to
bearer.

Sect. 7.—(1.) “A trustee, unless authorized by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

- (a) The India Stock Certificate Act, 1863;
- (b) The National Debt Act, 1870;
- (c) The Local Loans Act, 1875;
- (d) The Colonial Stock Act, 1877.

(2.) “Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted” (d).

Loans and
investments
by trustees
not charge-
able as
breaches of
trust.

Sect. 8.—(1.) “A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report (e).

(2.) “A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor’s title.

(3.) “A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or

(d) As to the custody of bearer securities, see *Re Porthonier*, [1900] 2 Ch. 529. For particulars of the various sections repealed by the Trustee Act, 1893, and replaced by sects. 5, 6 and 7 of the Act set out in the text, see *Wolst. Conv. Acts*, 10th ed. 252—254.

(e) See as to the effect of and recent decisions on this sub-section, *Wolst. Conv. Acts*, 10th ed. 254.

in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) "This section applies to transfers of existing securities as well as to new securities and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

Sect. 9.—(1.) "Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest."

Liability for loss by reason of improper investments.

(2.) "This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

By sect. 4 of the Trustee Act (1893) Amendment Act, 1894 (57 Viet. c. 10), it is provided that a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment authorized by the instrument of trust or by the general law (f).

It has already appeared (g), that where personal property is bequeathed for life, with remainder over, and not specifically, it is the duty of the executor, with certain exceptions, to convert it; and the tenant for life is entitled only upon that principle. In the case of *Dimes v. Scott* (h), a testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during

Consequence of not converting property bequeathed for life with remainder over:

(f) See *Re Chapman*, [1896] 1 Ch. 323; [1896] 2 Ch. 763, *post*, p. 1441.

(g) *Ante*, p. 1117 *et seq.*

(h) 4 Russ. Chanc. Cas. 195. See also *Taylor v. Clark*, 1 Ha. 161; and cf. *Re Earl of Chesterfield's Trusts*, 24 O. D. 643, as to apportionment between tenant for life and remainderman of unconverted reversionary interests; and see *ante*, p. 1119.

her life, and after her death, for B.: The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A. the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cents., at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: And it was held by Lord Gifford, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had, in fact, paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death: And this decision was confirmed, on appeal, by Lord Lyndhurst. In the case of *Mackenzie v. Taylor* (*i*), where the testator gave his residuary personal estate to his executors upon trust, as soon as convenient after his death, to convert into money and invest the same, and the executors allowed it to be enjoyed in specie by Mrs. M., the tenant for life, as long as she lived, but three years after her death, they accounted for the value and paid it into Court; it was held by Lord Langdale that they ought to pay interest at four per cent. from her death to the day of such payment (*j*). In *Wightwick v. Lord* (*k*), in a case where the Will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, did not ascertain and secure the residue at the end of the year, but worked part of the

(*i*) 7 Beav. 467.

(*j*) As to circumstances under which executors are charged with interest, see *post*, p. 1471; as to the rate of interest with which an executor may be charged, *post*, p. 1472. As to the rate of interest to be allowed in apportioning the amount of an unconverted reversionary interest on its falling into possession as between tenant for life and remainderman, see now *Re Goodenough*, [1895] 2 Ch. 537; *Rowlls v. Bebb*, [1900] 2 Ch. 107; but see *Re Beech*, *ante*, p. 1118, n. (*z*).

(*k*) 6 H. L. C. 217.

property (a coal mine) to a profit for several years, when it ceased to be of any value; it was held, on a bill at the suit of a person having a charge for life on the residue, that the executor was not entitled to postpone the sale of the property to the prejudice of such person, and that having postponed it, he was chargeable with the value of the mine at the end of the year from the testator's death with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years till it became unproductive, such annual profits to be treated as deferred payments.

But in *Baud v. Fardell* (1), it was held that an executrix, who was also tenant for life under a Will directing the residuary estate to be sold and the proceeds invested in government or other good securities, was not liable for not converting into consols a sum of Navy 5l. per cents. forming part of the residuary estate: for she had a discretion expressly reposed in her as to the nature of the investment.

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, they retain the money in their hands, or invest it upon an insufficient security, the *cestuis que trust* may elect to charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money (m). Where, however, the trustees are not bound to invest the money in the public funds, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, the authorities were conflicting on the question whether, if the trustees fail to invest as prescribed, the *cestuis que trust* can claim to charge them with the value of some particular security that might have been obtained, or whether they are merely chargeable with the whole amount of the trust fund, together with interest (n). But this question has been settled in favour of the latter view, by the decision of the Lords Justices in *Robinson v. Robinson* (o).

(1) 7 De G. M. & G. 628.

(m) *Shepherd v. Moulds*, 4 Hare, 503, 504; *Pride v. Fooks*, 2 Beav. 430; *Robinson v. Robinson*, 1 De Gex, M. & G. 256.

(n) *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379, were in favour of the former view: *Marsh v. Hunter*, 6 Madd. 295; and *Shepherd v. Moulds*, 4 Hare, 500, of the latter.

(o) 1 De Gex, M. & G. 247. See also *Knott v. Cottee*, 16 Beav.

Consequences
of retaining
in hand
instead of
investing; or
of investing
on a deficient
security:

loss by not
calling in
money on
securities, or
in hands of
banker.

This consideration leads to the question, how far an executor or administrator is liable in respect of losses occasioned by not calling in the money of the testator already invested upon securities. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary: Accordingly, in *Powell v. Evans* (*p*), executors were charged with a loss caused by neglecting to call in money lent by the testator on bond (*q*). Though the *primâ facie* rule is that executors should get in the assets of the testator within a year (*r*), there is no inflexible rule as to the time within which they are bound to do so, even with regard to risky securities. In every case the particular circumstances must govern, and the Court allows the executors a reasonable discretion (*s*). Where executors have neglected to realize assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. Thus in *Hughes v. Empson* (*t*) losses were occasioned by the non-sale of Crystal Palace shares, which were at a premium at the testator's death, but which subsequently fell to a discount, and the executors were charged with the value at the end of twelve months. So in *Moyle v. Moyle* (*u*), executors and trustees who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss (*v*). So executors were held personally liable in respect to the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond of the tes-

80, 81, by Romilly, M. R.; *Brown v. Gellatly*, L. R. 2 Ch. 751, 759; *Re Campbell*, [1893] 3 Ch. 470; *Re Barclay*, [1899] 1 Ch. 674.

(*p*) 5 Ves. 839. See the effect of the Judicial Trustee Act, 1896; *Re Grindey*, [1898] 2 Ch. 593, *post*, p. 1449.

(*q*) See also *ante*, p. 1425; *Rowley v. Adams*, 4 Mylne & Cr. 496, and *Eagleton v. Kingston*, 8 Ves. 466, 467; *Att.-Gen. v. Higham*, 2 Y. & Coll. C. C. 634. The money, when called in, should be invested in some authorized fund, if there is no present occasion for it: *Howe v. Lord Dartmouth*, 7 Ves. 149, 150. This seems a sufficient answer to the inquiry of Lord Camden in *Orr v. Newton*, 2 Cox, 276.

(*r*) *Grayburn v. Clarkson*, L. R. 3 Ch. 605, 606, *per* Page-Wood, L. J.; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Brown v. Gellatly*, L. R. 2 Ch. 751, 759.

(*s*) *Hughes v. Empson*, 22 Beav. 181, 183, *per* Romilly, M. R.; *Marsden v. Kent*, 5 C. D. 598; *Re Chapman*, [1896] 2 Ch. 763, 782; *Brown v. Gellatly*, *ubi supra*.

(*t*) 22 Beav. 181.

(*u*) 2 Russ. & M. 710.

(*v*) See *Johnson v. Newton*, 11 Hare, 168, 169.

tator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his Will he directed that his trustees should get in his outstanding estate "as soon as conveniently might be" after his decease (*x*). But in *Buxton v. Buxton* (*y*), an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, by Sir C. C. Pepys, M. R., under the circumstances, not to be liable for the loss consequent on his not having sold them sooner: And his Honour further held that a difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand (*z*). This case was followed in the case of *Marsden v. Kent* (*a*), in which the Court held that where the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth. And in *Re Chapman* (*b*) it was held by the Court of Appeal that there was no rule that executors and trustees retaining a security authorized by their trust are liable to make good a loss sustained through the fall in value of the security, provided that in so doing they have acted honestly and prudently, in the belief that they have taken the best course for all parties interested in the trust estate.

Executors acting under a Will by which *an absolute discretion is given to them to postpone the sale and conversion of the testator's estate* are not bound by the ordinary rule above referred to, viz., to convert the property within a year, even

Where executors have an absolute discretion to postpone sale of testator's estate.

(*x*) *Bullock v. Wheatley*, 1 Coli. 130.

(*y*) 1 Mylne & Cr. 80.

(*z*) See also *East v. East*, 5 Hare, 348.

(*a*) 5 C. D. 598.

(*b*) [1896] 2 Ch. 763. And see *Re Grindey*, [1898] 2 Ch. 593; *Rawsthorne v. Rowley*, [1909] 1 Ch. 409, *n*.

though some of the property consists of shares in an unlimited company, or of a business carried on by the testator, nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion (c). So too an express power to retain existing investments takes a case out of the rule as to the conversion of perishable property (d).

It is not the duty of an executor to call in money invested on real security, where no risk is apparent (e).

Receipt of
trust money
by person
appointed by
executor for
the purpose.

Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands; and, consequently, the improper appointment of another to receive, who will not repay, is a *devastavit* (f). Thus, in a case where the Will directed that one Pistor should carry on the business of the testator to a given day, for the benefit of his estate, and the executors, from the confidence thus reposed by the testator in Pistor, permitted him to get in debts, without anything appearing on the Will to show the testator's intention to that effect, the Court of Exchequer held, that the executors must answer to the residuary legatee for the money so received by their agent (g). So where trustees for sale sold the trust property and placed the conveyance executed by them and having their receipt indorsed, in the hands of a solicitor, who received and misapplied the purchase-money, they were held liable for a breach of trust (h). Again, where trustees left some Exchequer Bills, in which they had

(c) *Re Norrington*, 13 C. D. 654. See also *Re Crowther*, [1895] 2 Ch. 56; *Re Pitcairn*, [1896] 2 Ch. 199; and cf. *Re Smith*, [1896] 1 Ch. 171.

(d) *Gray v. Siggers*, 15 C. D. 74.

(e) *Howe v. Lord Dartmouth*, 7 Ves. 150; *ante*, p. 1121 *et seq.* As to whether Turnpike Bonds are real securities, see *Robinson v. Robinson*, 1 De Gex, M. & G. 247, and *Cavendish v. Cavendish*, 30 C. D. 227.

(f) *Jenkins v. Plombe*, 6 Mod. 93.

(g) *Pistor v. Dunbar*, 1 Anst. 107.

(h) *Ghost v. Waller*, 9 Beav. 497. See also *Bostock v. Floyer*, L. R. 1 Eq. 26; *Sutton v. Wilders*, L. R. 12 Eq. 373; *Re Brier*, 26 C. D. 238. The liability of the executor, according to the case of *Speight v. Gaunt*, 9 A. C. 1, affirming the decision of the Court of Appeal reported in 22 C. D. 727, would seem to depend on whether the defaulting agent was properly employed. If he was properly employed in the ordinary course of business, the executor would not seem to be liable: *Sutton v. Wilders* (*ubi supra*) would probably be decided differently since *Speight v. Gaunt*. See *post*, p. 1447, as to the power to appoint a solicitor as agent to receive money under sect. 17 of the Trustee Act, 1893.

properly invested trust money, in the hands of a broker, they were held personally liable upon a misapplication of the bills by the broker (*i*).

But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss (*k*). So if the executor, living in London, and receiving money of the testator, should remit to an attorney in the country to pay the debts there, and the attorney becomes insolvent, the executor will not be chargeable, if the business was transacted in the ordinary manner without any circumstance to show suspicion (*l*). So where executors employ an auctioneer to sell the leaseholds, or other portion of the assets, who receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss (*m*). But in *Darke v. Martyn* (*n*), where a testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers on their notes carrying interest; and the bankers failed in November, 1825; Lord Langdale, M. R., held, that *as no necessity had been shown for such deposit*, the trustees were personally responsible for the loss (*o*). So where a trustee deposited a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, he was held answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bankrupt (*p*). And if an executor pays the money of the testator

(*i*) *Matthews v. Brise*, 6 Beav. 239. See also *Rowland v. Witherden*, 3 Mac. & G. 568, and Trustee Act, 1893, s. 24.

(*k*) *Churchill v. Hobson*, 1 P. Wms. 243; *Knight v. Lord Plymouth*, 3 Atk. 480; *S. C.*, 1 Dick. 120; *Ex parte Belchier*, Ambl. 219; *Rowth v. Howell*, 3 Ves. 565; *Adams v. Claxton*, 6 Ves. 226; *Wilks v. Groom*, 3 Drewr. 584; *Swinfen v. Swinfen*, 29 Beav. 211; *Johnson v. Newton*, 11 Hare, 160; *Mendes v. Guedalla*, 2 J. & H. 259; *Fenwick v. Clarke*, 31 L. J. Ch. 728; *Re Bird*, L. R. 16 Eq. 203; *Speight v. Gaunt*, 9 App. Cas. 1; *Re Brier*, 26 C. D. 238.

(*l*) *Bacon v. Bacon*, 5 Ves. 334, 335; *Castle v. Warland*, 32 Beav. 660; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707.

(*m*) *Edmonds v. Peake*, 7 Beav. 239. See also Trustee Act, 1893, s. 24, *post*, p. 1457.

(*n*) 1 Beav. 525.

(*o*) See also *Rehden v. Wesley*, 29 Beav. 213.

(*p*) *Challen v. Shippam*, 4 Hare, 555.

into a banker's not on any distinct account, but *mixing it with his own money*, it would seem that the executor will be answerable for the loss sustained by the failure of the banker (q). So, where an executor or trustee pays trust money to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheque, the rule in *Clayton's Case* (r), attributing the first drawings out to the first payments in, does not apply, and the executor or trustee must be taken to have drawn out his own money in preference to the trust money (s).

Review of
law in
Speight v.
Gaunt.

The whole of the law on the question of the liability of executors and trustees for losses in the management and realization of trust estates was reviewed in the House of Lords in the case of *Speight v. Gaunt* (t). The general result seems to be this: Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as according to the usual mode of conducting business of a like nature persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and where, according to the usual and regular course of such business (u), moneys receivable or payable ought to pass through the hands of such mercantile agents (x), that course may properly be followed by trustees, though the moneys are trust moneys; and if under such circumstances, and without any

(q) *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Massey v. Banner*, 4 Madd. 413; *S. C.*, 1 Jac. & Walk. 241; *Robinson v. Ward*, Ry. & Mood. 274; *S. C.*, 2 O. & P. 59. See also *Salway v. Salway*, 2 Russ. & M. 215, in which case, Lord Brougham held (overruling the decision of Sir J. Leach, M. R., 4 Rus. 60), that a receiver appointed by the Court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund: This judgment was afterwards affirmed in Dom. Proc.: *White v. Baugh*, 9 Bligh, 181.

(r) 1 Mer. 572.

(s) *Re Hallett's Estate*, 13 C. D. 696, overruling *Brown v. Adams*, L. R. 4 Ch. 764; *Re Oatway*, [1903] 2 Ch. 356.

(t) 9 A. C. 1.

(u) Where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was: *Re Brier*, 26 C. D. 238.

(x) This rule is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. It is not part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest money on mortgage: *Fry v. Tapson*, 28 C. D. 268.

other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss (*y*). In conformity with this doctrine the statute 22 & 23 Vict. c. 35, s. 31 (*z*), enacted that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability "for any banker, broker, or other person, with whom any trust moneys or securities may be deposited."

But neither this statute nor the doctrine of *Ex parte Belchier* (*a*) authorized a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which there is no moral necessity from the usage of mankind for the employment of such an agency. The cases of *Rowland v. Witherden* (*b*), *Bostock v. Floyer* (*c*), and many others show that trustees bound to invest trust moneys in authorized securities are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse (*d*).

The result of the authorities on the subject of the general liability of executors was thus stated by Lord Cottenham, in the year 1838, in his judgment in the case of *Clough v. Bond* (*e*): "Although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal repre-

General result of authorities as to the liability of executors for loss of assets.

(*y*) *Ex parte Belchier*, Ambl. 218. A trustee although remunerated for his services is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence: and *semble*, the liability of a trustee is not increased by the fact of his being remunerated for his services: *Jobson v. Palmer*, [1893] 1 Ch. 71.

(*z*) See *post*, p. 1457.

(*a*) Ambl. 218. Cf. *ante*, p. 705.

(*b*) 3 Mac. & G. 568, 574.

(*c*) 35 Beav. 603, 606; L. R. 1 Eq. 26.

(*d*) See *per* Lord Selborne, L. C., in *Speight v. Gaunt*, 9 A. C. 1, 5.

(*e*) 3 Mylne & Cr. 496.

sentative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive (*f*). Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*g*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*h*). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus he is not liable upon a proper investment in the three per cents. for loss occasioned by the fluctuations of that fund (*i*), but he is for the fluctuations of any unauthorized fund (*k*). So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted: Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative: But, if without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable although the person possessing it be a co-executor or co-administrator" (*l*).

(*f*) Of course if there be fraud or wilful default on the part of the executor, or he be actuated by an improper motive, he will be liable for any loss: *De Cordova v. De Cordova*, 4 A. C. 692.

(*g*) *Phillips v. Phillips*, 2 Freem. 11, *ante*, p. 1424; *Fry v. Fry*, 27 Beav. 144.

(*h*) *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290. Or if he fail to take legal proceedings to enforce payment of the trust funds if not paid within a reasonable time, unless he has a well-founded belief that such proceedings would be fruitless: *Re Brogden*, 38 C. D. 546; or if, even on the advice of a competent solicitor and surveyor, he invest on a freehold security of an improper character, such as brickworks, though within the terms of a power of investment on real property: *Re Whiteley*, 33 C. D. 247; 12 A. C. 727. See also *ante*, pp. 1425, 1440.

(*i*) *Peat v. Crane*, 3 Dick, 499, note; *ante*, p. 1430.

(*k*) *Hancom v. Allen*, 2 Dick, 498; *Howe v. Lord Dartmouth*, 7 Ves. 137; *ante*, p. 1430.

(*l*) *Langford v. Gascoyne*, 11 Ves. 333, *post*, pp. 1452, 1454; *Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477, *post*, p. 1452; *Underwood v. Stevens*, 1 Meriv. 712, *post*, p. 1458; *Styles v. Guy*, 1 Mac. & G. 422, *post*, p. 1456; *Trutch v. Lamprell*, 20 Beav. 116. The following are cases bearing on the general principles above stated, viz., *Bacon v. Clark*, 3 M. & Cr. 294; *Lowry v. Fulton*, 9 Sim. 115; *Munch v. Cockerell*, 9 Sim. 339; 5 M. & Cr. 178; *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16; *Booth v. Booth*, 1 Beav. 125; *Phillipson v.*

Modern legislation has, however, gone some little way towards alleviating the burden of responsibility which was thrown on executors and trustees by the earlier decisions. Thus, by sect. 56 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it is provided that:—

- (1.) “Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.”

44 & 45 Vict.
c. 41, s. 56.

Receipt in
deed or
indorsed
authority for
payment to
solicitor.

- (2.) “This section applies only in cases where consideration is to be paid or given after the commencement of this Act.”

And by sect. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing sect. 2 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), it is provided that:—

56 & 57 Vict.
c. 53, s. 17.

Receipt of
money by
solicitor as
agent.

- (1.) “A trustee (*m*) may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee (*n*). ”

Gatty, 7 Hare, 516; *Byrne v. Norcott*, 13 Beav. 336; *Garner v. Moore*, 3 Drewr. 277; *Lander v. Weston*, 3 Drewr. 389; *Collinson v. Lister*, 20 Beav. 356; 7 De G. M. & G. 634; *Gibbins v. Taylor*, 22 Beav. 344; *Selby v. Bowie*, 4 Giff. 300; *Griffith v. Porter*, 25 Beav. 236; *Fry v. Fry*, 27 Beav. 144, 146.

(*m*) Which in this Act by sect. 50 includes an executor or administrator.

(*n*) See Wolst. Conv. Acts, 10th ed. 271; *Re Hetling and Merton*, [1893] 3 Ch. 269.

- (2.) "A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of, and to produce, the policy of assurance, with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.
- (3.) "Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary (o) to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee (p).
- (4.) "This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.
- (5.) "Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

59 & 60 Vict.
c. 35.

Protection of
trustees in
cases of
breach of
trust.

By sect. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), it is enacted as follows:—

- (1.) "If it appears to the Court that a trustee (q), *whether appointed under this Act or not*, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may

(o) *Wyman v. Paterson*, [1900] A. C. 271.

(p) In order to bring into operation this sub-section, the executor must have known or ought to have known of the receipt of the money: *Re Sheppard*, [1911] 1 Ch. 50.

(q) By sect. 1 (2) of the Act, the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act. See *Re Ratcliff*, [1898] 2 Ch. 352.

relieve the trustee either wholly or partly from personal liability for the same.

- (2.) "This section shall come into operation at the passing of this Act."

No general rules or principles can be laid down as those to be acted on in carrying out this section: each case depends on its own circumstances. But the trustee must be shown to have acted reasonably as well as honestly (*r*) and ought fairly to be excused (*s*).

The onus is on a trustee who applies for relief under the section to prove that he has satisfied its requirements. One test in the case of a trustee lending trust moneys may be whether he would have acted in the same way if the money had been his own. *Primâ facie*, the provisions of the Trustee Act, 1893, s. 8, constitute a reasonable standard by which his conduct in such matters may be judged (*t*).

The section applies to the case of an executor who has committed a *devastavit*, but in construing the section, the Court is bound to remember the provisions of 22 & 23 Vict. c. 35, s. 29, and to see that there has been no undue delay in advertising for claims (*u*).

The section is not confined to cases of breach of trust, but applies to an action for a common account (*x*).

Semble, the statute does not by implication confer jurisdiction on the Court to exercise by anticipation the authority thereby conferred upon it, so as to excuse a breach of trust which is only contemplated (*y*).

Relief has been given where an executor neglected to sue for a debt (*z*), where executors remitted money to their solicitors for administration purposes (*a*), where an executor compromised a claim of his co-executor (*b*), where by mistake

(*r*) *Re Turner*, [1897] 1 Ch. 536; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707. Where trustees, erroneously assuming they had a power of sale, made an otherwise proper sale of settled leaseholds, they were relieved under this section: *Perrins v. Bellamy*, [1898] 2 Ch. 521; [1899] 1 Ch. 797.

(*s*) *National Trustees Co. v. General Finance Co.*, [1905] A. C. 373.

(*t*) *Re Stuart*, [1897] 2 Ch. 583.

(*u*) *Re Kay*, [1897] 2 Ch. 518.

(*x*) *Re Kay*, *supra*; *Re Lord de Clifford's Estate*, [1900] 2 Ch. 707, 716.

(*y*) *Re Tollemache*, [1903] 1 Ch. 457, 466; [1903] 1 Ch. 955.

(*z*) *Re Roberts*, 76 L. T. 479; *Re Grindey*, [1898] 2 Ch. 593.

(*a*) *Re Mackay*, [1911] 1 Ch. 300; *Re de Clifford*, *supra*.

(*b*) *Re Houghton*, [1904] 1 Ch. 622, 626.

money was paid to the wrong persons (*c*), where too large a sum was advanced on mortgage (*d*).

Relief was refused where trust funds were advanced on improper security (*e*), on a second mortgage (*f*), or on a contributory mortgage (*g*), where some shares were paid without retaining sufficient to satisfy the others (*h*), where a trust for conversion was postponed for 14 years (*i*), where trustees omitted to seek advice (*k*).

It is not necessary to plead the Act as a defence (*l*).

In what case
an executor
is liable
for the
devastavit
of his co-
executor.

A *devastavit* by one of two executors or administrators will not charge his companion (*m*), provided he has not intentionally or otherwise contributed to it: For the testator's having misplaced his confidence in one shall not operate to the prejudice of the other (*n*).

Hence, an executor will not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor (*o*). Hence, also, the circumstances that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, did not affect the latter, so as to make him guilty of a *devastavit* by paying an inferior debt (*p*); though, perhaps, if notice to one executor were proved, and nothing more appeared, it would have been presumed that he communicated it to his co-executor (*q*).

But where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over,

(*c*) *Re Allsop*, [1914] 1 Ch. 1.

(*d*) *Palmer v. Emmerson*, [1911] 1 Ch. 758.

(*e*) *Re Turner*, *supra*; *Re Stuart*, *supra*; *Shaw v. Cates*, [1909] 1 Ch. 389; but see *Palmer v. Emmerson*, *supra*.

(*f*) *Chapman v. Browne*, [1902] 1 Ch. 785.

(*g*) *Re Dive*, [1909] 1 Ch. 328.

(*h*) *Re Brookes*, [1914] 1 Ch. 558.

(*i*) *Re Barker*, 77 L. T. 712.

(*k*) *Chapman v. Browne*, *supra*; *Re Houghton*, *supra*.

(*l*) *Re Pawson*, [1917] 1 Ch. 541.

(*m*) *Wentworth*, Off. Ex. 306, 14th edit.; *Anon.*, Dyer, 210, *a*; *Hargthorpe v. Millforth*, Cro. Eliz. 318; *Williams v. Nixon*, 2 Beav. 472.

(*n*) Cro. Eliz. 319.

(*o*) Cro. Eliz. 319; *Littlehales v. Gascoyne*, 3 Bro. Chanc. Cas. 74; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 412, by Romilly, M. R. See also Trustee Act, 1893, s. 24, *post*, p. 1457.

(*p*) *Hawkins v. Day*, Ambl. 162.

(*q*) *Ibid.* See *Timson v. Ramsbottom*, 2 Keen, 35; *Smith v. Smith*, 2 Cr. & M. 231; *Meux v. Bell*, 1 Hare, 73.

will be answerable for their misapplication, unless he can show a good reason for having so acted (*r*).

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had entrusted to receive it (*s*). Accordingly, although the appointment of one of several trustees to manage the property would not *per se* make the other trustees responsible for his acts, yet it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts or receipts of a stranger (*t*).

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not necessarily responsible (*u*). If, however, the one,

(*r*) *Townsend v. Barber*, Dick. 356; *Macpherson v. Macpherson*, 1 Macq. H. of L. 243. However, in the case of *Davis v. Spurling*, 1 Russ. & M. 66, an executor was employed by his co-executor as his agent to sell an estate which, under the Will of the testator, the co-executor alone had power to sell: The executor so employed handed over the price of the estate to the co-executor, who afterwards misapplied it: And Sir John Leach, M. R., held, that although, by the Will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate, yet the executor, so handing it over, was not accountable for the misapplication of it; inasmuch as he had no legal right to retain it: for it was in his hands, not as executor, but simply as agent of his co-executor, who alone had power to sell the estate and to receive the price of it.

(*s*) See Mr. Cox's note to *Churchill v. Hobson*, 1 P. Wms. 241, and Lord Thurlow's judgment in *Sadler v. Hobbs*, 2 Bro. C. C. 117.

(*t*) *Home v. Pringle*, 8 Cl. & F. 264, 268. See also *Toplis v. Hurrell*, 19 Beav. 423, where the rule here stated was adopted by Romilly, M. R. See also *Candler v. Tillett*, 22 Beav. 263; *Cowell v. Gatcombe*, 27 Beav. 568; *Ingle v. Partridge*, 32 Beav. 661. It was held by the Court of Appeal in *Re Gasquoigne*, [1894] 1 Ch. 470, that the proposition in *Candler v. Tillett*, *supra*, that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate is liable for the co-executor's misapplication of it, must be read "who unnecessarily does an act." Such an act is not "unnecessary" if it is done in the regular course of business in administering the property.

(*u*) *Langford v. Gascoyne*, 11 Ves. 335; *Candler v. Tillett*, 22 Beav. 257. This, it would seem, applies only to cases where the question arises under a decree for the common accounts, and not under a special charge against the executor for wilful neglect and default: *Terrell v. Mathew*, 1 M. & G. 433, note (*a*). See also the remarks of the reporters of that case, *ibid*. He would clearly be liable if he stood by and saw his co-executor commit a breach of duty. See the cases cited *post*, pp. 1456, 1457.

in any way, contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse (*x*). Thus in the case of several executors, if, by agreement among themselves, one is to receive and intermeddle with such part of the estate, and another with such a part, each of them will be chargeable for the whole; because the receipts of each are pursuant to the agreement made between them (*y*). So where A., B., C., D. and E. (the two latter being married women) took out administration to an intestate, and afterwards appointed C. to be the acting administrator, and directed the creditors to pay their debts to him: and C. became insolvent; it was held that A., B. and the husbands of D. and E., were responsible for C.'s receipts (*z*). So where a man made several executors, who all joined in the sale of the testator's goods, but one only received the money, and he became insolvent; it was held that they should all be charged (*a*).

Accordingly, an executor, having a fund standing in the joint names of himself and another, cannot, upon the mere representation of the co-executor, be justified in doing, without further inquiry, an act that is an exercise of power over that fund: the act must be necessary for the purposes of the Will, and he has the duty imposed upon him of exercising at least ordinary and reasonable diligence to inquire whether the representation of the co-executor is true (*b*).

If an executor has been dealing with the assets for a considerable time, much beyond that period in which, according to the ordinary course, the debts would be paid, and he applies to the other executor to have a fund put into his hands exclusively, and the other does inquire, and satisfies himself that there are debts unpaid, and the real purpose of the executor making the application was to apply the fund to the discharge of debts; and if it turns out afterwards, that he had in his own hands a

(*x*) *Langford v. Gascoyne*, 11 Ves. 335; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16. See also note (*s*), *supra*.

(*y*) *Gill v. Att.-Gen.*, Hardr. 314; cf. *Lewis v. Nobbs*, 8 C. D. 591; *Moses v. Levi*, 3 Y. & C. C. C. 359.

(*z*) *Lees v. Sanderson*, 4 Sim. 82.

(*a*) *Ap'lyn v. Brewer*, Prec. Chan. 173; *Burrows v. Walls*, 5 De G. M. & G. 233.

(*b*) *Shipbrook v. Lord Hinchinbrook*, 11 Ves. 254; 16 Ves. 477; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16.

fund sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in fact devoted to the purpose for which it was provided, it would be impossible for the executor, who parted with it, to discharge himself: He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking how he had been dealing with the assets in his hands. It was accordingly held by Lord Eldon, in *Shipbrook v. Lord Hinchinbrook* (c), that where executors joined in a transfer of stock, vested in the name of all the executors, to a co-executor, upon his groundless representation that it was required for debts, the executors were answerable for the whole of the produce of the stock which they could not prove to have been applied by the co-executor to the payment of debts of the testator: But his Lordship further held, that they were not liable so far as they could prove the application to that purpose, although he possessed other funds, part of the assets, not through them, which funds he wasted.

Again, in *Langford v. Gascoyne* (d), it appeared from the affidavit of a witness, that on the day after the testator's funeral, his three executors, Gascoyne, Spurrell and Lambert, met at his house, and his widow, being present, left the room to fetch a bag of money: Upon her return with it, she asked the witness to which of the executors she should deliver it; and the witness not then having a good opinion of Gascoyne's circumstances, advised her to give it to Spurrell; upon which she passed by Gascoyne and Lambert, who were sitting near the door, and gave the bag into the hands of Spurrell, who counted the money over, and then delivered it into the hands of Gascoyne: The witness further stated, that at the time Gascoyne was not reputed to be in good circumstances: And Sir Wm. Grant held, that the money must be considered to have been so far in the hands of Spurrell, that he was answerable for what afterwards became of it; but that as to the other executor, Lambert, it was impossible to charge him: for that he had neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne: And his

(c) 11 Ves. 252; *S. C.*, 16 Ves. 477. See also *Mendes v. Guedalla*, 2 Johns. & H. 259; *Chambers v. Minchin*, 7 Ves. 186; *Underwood v. Stevens*, 1 Meriv. 713; *Williams v. Nixon*, 2 Beav. 472; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. O. 16.

(d) 11 Ves. 333.

Honour observed, that it was not incumbent upon one executor by force to prevent the money getting into the hands of another.

So in *Moses v. Levi* (e), a testatrix bequeathed the residuo of her property to certain persons, some of whom lived in the west of England, and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss: The executors having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose: The Diss executor made default in payment of one of the legatees in that neighbourhood: And Alderson, B., held that the other executor was responsible for the default.

But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss; for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands, he would not have been liable (f). So if an executor in the country executes a power of attorney to a co-executor in town for the purpose of changing a fund of the testator, as the Court would order it to be changed, as from the long annuities to three per cents., the act is justifiable, being for a purpose belonging to the administration of assets; but not to change it to an unauthorized investment (g). So in *Bacon v. Bacon* (h), where an executor living in London, paid money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, Lord Loughborough held, that the executor, who had paid the money under such circumstances, should not be charged with the loss (i).

(e) 3 Younge & Coll. 359. See also *Lewis v. Nobbs*, 8 C. D. 591.

(f) *Churchill v. Hobson*, 1 P. Wms. 241; *Chambers v. Minchin*, 7 Ves. 198. See also *Att.-Gen. v. Randell*, MS. Rep. 21 Vin. Abr. 534, tit. Trust.; (N. a.) pl. 9. As to delegation, see *ante*, p. 1442. See also *ante*, pp. 705, 1403.

(g) *Chambers v. Minchin*, 7 Ves. 193, by Lord Eldon. See *ante*, p. 1444.

(h) 5 Ves. 331.

(i) This decision was approved of by Lord Eldon, in *Chambers v. Minchin*, 7 Ves. 193. See *Davis v. Spurling*, 1 Russ. & M. 66, where Sir John Leach, M. R., intimates, that an executor, handing over

Again, it has been held, that one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer (*k*): Accordingly, where a bill of exchange was remitted to two agents, payable to them personally, who, on the death of the principal, became his executors, Lord Alvanley held, that the mere indorsement of one, after they were executors, in order to enable the other to receive the money, was not sufficient to charge him who did not receive it (*l*). So it was laid down by Lord Redesdale in *Joy v. Campbell* (*m*), that if an executor, living in London, remits money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way: It would be the same, were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence" (*n*).

One executor not answerable for receipt of the other merely by taking probate, &c.

assets to his co-executor for the express payment of a particular debt, will not be answerable for their misapplication. See also *Castle v. Warland*, 32 Beav. 660; but in *Hanbury v. Kirkland*, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife: The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock: The co-trustees, without inquiring into the matter, complied: The trustee sold the stock and absconded: And Sir L. Shadwell, V.-C., held that the co-trustees were liable. See also accord. *Broadhurst v. Balguy*, 1 Y. & Coll. Ch. C. 16; *Trutch v. Lamprrell*, 20 Beav. 116.

(*k*) *Hovey v. Blakeman*, 4 Ves. 596. But see *ante*, p. 1451, note (*u*), and *Styles v. Guy*, 1 Mac. & G. 422, considered, *post*. p. 1456.

(*l*) *Hovey v. Blakeman*, 4 Ves. 608, 609.

(*m*) 1 Sch. & Lef. 341.

(*n*) In *Speight v. Gaunt*, 22 C. D. 727, 744, Jessel, M. R., commenting on this case says: "That is a mere question of selecting an agent. Of course, although the testator reposed confidence in him something else might happen afterwards, the man might become insolvent, or the like, it does not mean that, but it is an additional reason that a

But the rule, it should seem, was different at law prior to the Judicature Act: Thus, in *Crosse v. Smith* (o), it was held, that an executor administering, having once received money, assets of his testator, could not discharge himself, under a plea of *plene administravit* to an action by a bond creditor, by showing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. Now, however, the rule at law as well as in equity, is that the executor stands in the position of a gratuitous bailee, and, therefore, cannot be charged without some wilful default (p).

Liability of executor who stands by and sees a breach of trust committed by his co-trustee:

It may here be mentioned that by the established rules of Courts of Equity, it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other; and that an executor as well as a trustee, who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust (q). Accordingly in *Booth v. Booth* (r), where a testator bequeathed to his partner and to one Batkin his personal estate, upon trust to invest the same, for the benefit of his wife and children, and both the executors proved the Will, but the surviving partner retained the testator's monies in the trade, and lost them, Lord Langdale, M. R., held, that Batkin, who took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it, was responsible for the consequences of the breach of trust. So, in *Lincoln v. Wright* (s), two executors, who permitted their co-executor to retain in his hands the ascertained residue, were held by the same learned Judge to be liable for a breach of trust. Again, in *Styles v. Guy* (t), where two out of three executors, with the knowledge that there were unsettled

man who was in good credit at the time was actually named as executor by the testator."

(o) 7 East, 246.

(p) *Job v. Job*, 6 C. D. 562, explained in *Meyer v. Murray*, 8 C. D. 424; Judic. Act, 1873, s. 25, sub-s. 11. See *ante*, pp. 1282, 1427.

(q) *Styles v. Guy*, 1 Mac. & G. 433, by Lord Cottenham; *Williams v. Nixon*, 2 Beav. 475, by Lord Langdale; *Horton v. Brocklehurst*, 29 Beav. 510, by Romilly, M. R.

(r) 1 Beav. 125.

(s) 4 Beav. 427.

(t) 1 Mac. & G. 422.

accounts subsisting at the testator's death between him and their co-executor, on taking which they had reason to believe that the latter would be found to be considerably indebted to the estate, took no effectual measures to compel him to account and pay or secure the balance for several years, at the end of which he became bankrupt, Lord Cottenham held, that the solvent executors (who were unable to prove that an attempt to recover the money at an earlier period would have been fruitless) were responsible for the loss, as having been occasioned by their wilful neglect and default (u).

In cases of the description above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors (x).

not precluded by the usual indemnity clause.

The Trustee Act, 1893, s. 24 (replacing 22 & 23 Vict. c. 35, s. 31), provides that "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers" (y).

Trustee Act, 1893, s. 24. Restriction on liability of trustees.

It may here be observed, that if an executor administers part of the assets, he shall be charged with such as he has received,

Liability of an executor who re-

(u) See also *Egbert v. Butler*, 21 Beav. 560; *Candler v. Tillett*, 22 Beav. 257; *Re Gasquoigne*, [1894] 1 Ch. 470.

(x) *Mucklow v. Fuller*, Jacob. 198. See also *Underwood v. Stevens*, 1 Meriv. 712; *Hanbury v. Kirkland*, 3 Sim. 265; *Williams v. Niron*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 409; *Brumridge v. Brumridge*, 27 Beav. 5; and *per* Lord Selborne in *Re Brier*, 23 C. D. at p. 243. But where the Will provided that any trustee who shall pay to his co-trustee, or enable him to receive, monies for the general purposes of the Will, should not be obliged to see to due application thereof or be responsible by reason of express or implied notice of the mis-application, it was held that this was a good answer to a bill against two of three trustees to make good trust monies which they had allowed their co-trustee to receive; *Wilkins v. Hogg*, 3 Giff. 116. See accord. *Pais v. Dundas*, 43 L. T. 665; 29 W. R. 332.

(y) See, as to this section, *Re Smith*, [1895] 1 Ch. 71; *Re Bennett*, *ibid.* 778; *Spreight v. Gaunt*, 9 Ap. Cas. 1.

nounces after
an act of ad-
ministration.

although he has renounced the executorship, and paid the money to a co-executor who proved the Will (z): For executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the assets themselves, or by putting the administration into the hands of a Court of Equity (a). Thus in *Doyle v. Blake* (b), A., named executor in a Will, acted on behalf of particular legatees, disclaiming an intention of interfering generally: He afterwards renounced formally in favour of B., who was named a trustee in the same Will, who thereupon obtained administration *cum testamento annexo*: B. possessed himself of the assets, and afterwards died insolvent: And it was held that A. was liable, as executor, notwithstanding his renunciation; and was answerable for the acts of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. So in *Underwood v. Stevens* (c), one of two executors and trustees did not act, otherwise than by joining with his co-executor and trustee in the sale of stock under a representation that the sale was necessary for payments of debts, which it was not; the produce was received by the latter, and the greater part applied by him to his own private purposes: And the first executor was held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at four per cent.; notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. Again, in *Rogers v. Frank* (d), the defendant, named in the Will as executor, did not prove the Will, but before he renounced, he collected large sums belonging to the estate of the testator: And it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will (e).

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, or by writing directly to a debtor of the

(z) *Read v. Truelove*, Ambl. 417.

(a) *Doyle v. Blake*, 2 Sch. & Lef. 231, 245. See *Riky v. Kemmis*, 1 Lloyd & Goold, 101; *Horton v. Brocklehurst*, 29 Beav. 504.

(b) 2 Sch. & Lef. 231.

(c) 1 Meriv. 712.

(d) 1 Y. & J. 409.

(e) See also *Harrison v. Graham*, stated *infra*.

testator, and requiring payment (f). So, if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets as agent to the other, who has proved the Will, the former does not thereby become accountable as executor (g). So in *Stacey v. Elph* (h), a person named as executor and trustee under a Will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust: During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: and it was held that he was not, under the circumstances, chargeable as executor or trustee. But in *Harrison v. Graham* (i), the case was as follows: Barbara Graham by Will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executrix, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: The question was, whether this was such an act of administration in Robert, as should make him chargeable as to his own estate: The Master had charged him, and the case came on, upon exceptions to the report: Lord Hardwicke:—"The question in the case is, whether or no this defendant had acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act, as an attorney to the other executors. If an executor renounces

(f) *Orr v. Newton*, 2 Cox, 274.

(g) *Dove v. Everard*, 1 Russ. & M. 231. See also *Lourey v. Fulton*, 9 Sim. 104.

(h) 1 M. & K. 195.

(i) 3 Hill's MS. 239; 1 P. Wms. 241, note (y) to 6th edit.

and then acts under a letter of attorney, it is no administration: for it depends on the nature of the act, accompanied with any other acts. Here is a Will and four executors. The Will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant, together with the other executors, to Margaret, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from Margaret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to Margaret; this cannot discharge him" (*k*).

Liability of an executor who has proved, but declines to act as executor.

It is a general rule, that where an executor has once proved the Will, he cannot renounce his representative character, and act under another: he can do no act in regard to the estate for which he is not answerable as executor. In the case of *Graham v. Keble* (*l*), a partner in a house of agency in India, where a deposit was made in trust for a particular purpose, was made one of the executors of him who made the deposit, and proved the Will: A power of attorney was sent from the executors in Europe to the house of agency, for them to act under: But it was held, that as the partner named executor had proved the Will, the house could only act under his authority, and that he himself could not renounce the executorship, and act in another character. But a co-executor, who proved, but never acted, cannot be charged by reason of the mere circumstance that he received a letter by post from a debtor to the estate, inclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who afterwards became insolvent (*m*).

Liability of a co-executor joining in a receipt.

Formerly there was much discussion as to whether an executor who joined in signing a receipt for money of which he had never had control, but which had been received by his co-executor, thereby made himself liable for its application (*n*).

Trustee Act, 1893, s. 24.

The non-liability of the executor appears to be now fully

(*k*) See also *James v. Frearson*, 1 Y. & C. C. C. 370; and *ante*, p. 196.

(*l*) 2 Dow. P. C. 17.

(*m*) *Balchen v. Scott*, 2 Ves. 678.

(*n*) See 8th Edit. of this Work, pp. 1840—1843.

settled by sect. 24 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (o).

Although it is true, as a general rule, that concurrence in an act of *devastavit* on the part of the parties injured by it, or acquiescence without original concurrence, will release the executors (p), yet the Court must inquire into all the circumstances which induced concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility (q).

When a *devastavit* is released by concurrence or acquiescence.

It may be noted that by sect. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), it is provided that:

Trustee Act, 1893, s. 45. Indemnity for breach of trust.

- (1.) "Where a trustee (r) commits a breach of trust at the instigation or request or with the consent in writing (s) of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just (t) for impounding all or any

(o) *Ante*, p. 1457.

(p) *Griffiths v. Porter*, 25 Beav. 236. See *Fletcher v. Collis*, [1905] 2 Ch. 24.

(q) *Walker v. Symonds*, 3 Swanst. 1; *Burrows v. Walls*, 5 De G. M. & G. 233, 251; *Davies v. Hodgson*, 25 Beav. 177. Neglect to sue, even for eighteen years, by a specialty creditor, is not such acquiescence in the non-payment by an executor of a sum payable under a covenant as to preclude the creditor from suing or charging the executor with a *devastavit* in neglecting to convert shares in a bank, which afterwards failed, and raise the necessary sum to pay the amount: *Re Baker*, 20 O. D. 230. The Court of Appeal in this case refused to draw any inference of concurrence or acquiescence from neglect to sue within the time limited by the Statute of Limitations; cf. *Re Birch*, 27 C. D. 622. On the other hand, in *Sleeman v. Wilson*, L. R. 13 Eq. 36, where persons claiming as beneficiaries under a trust acquiesced for thirty-eight years in no steps being taken towards realizing securities, it was held that the plaintiffs, by their acquiescence, had lost their right to make any claim against the estate; cf. *Dixon v. Dixon*, 9 C. D. 587; *Re Hulkes*, 33 C. D. 552. See further on the subject of *laches*, *ante*, p. 1082, note (e). A claim founded on a *devastavit* in distributing personal estate without providing for a mortgage debt was held to be barred after six years: *Re Gale*, 22 C. D. 820; *Lacons v. Warmoll*, *infra*. An executor can plead the Trustee Act, 1888, against a creditor, and can set up his own *devastavit* in order to obtain the benefit of the statute: *Re Blow*, [1914] 1 Ch. 233, approving dictum in *Lacons v. Warmoll*, [1907] 2 K. B. 364, and following *How v. Winterton*, [1896] 2 Ch. 626.

(r) Which includes, by sect. 50, an executor or administrator.

(s) The words "in writing" apply only to "consent," and not to "instigation" or "request": *Griffith v. Hughes*, [1892] 3 Ch. 105.

(t) The discretion which this section confers upon the Court of ordering that the interest of the beneficiary be impounded by way

part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

- (2.) "This section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the 24th day of December, 1888, and is pending at the commencement of this Act."

Distinction
as to
executors'
liability
between
creditors and
legatees.

It may be observed, in concluding this subject, that in *Churchill v. Hobson* (u), Lord Harcourt took a distinction between creditors and legatees (x). But Lord Thurlow, in *Sadler v. Hobbs* (y), said that this seemed to him an odd distinction, that a creditor should have a right to charge an executor and a legatee not. It would seem, however, that there may be cases where the strictness of law would charge a man as executor as to creditors, in which a Court of Equity would not charge him as to legatees: For example, legatees are bound by the terms of the Will, but creditors are not so: and therefore, in many instances executors would be discharged as against legatees, though not as against creditors (z).

Present law
as to liability
of *feme
covert*
executrix.
45 & 46 Vict.
c. 75.

It remains to consider the doctrine of *devastavit*, as applied to the case of a married woman, executrix or administratrix.

It is provided by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), that:—

Sect. 1. (2.) "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or

of indemnity to the trustee, ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust: *Griffith v. Hughes*, *ubi supra*.

(u) 1 P. Wms. 242.

(x) See the remark of Lord Northington on this distinction: *Haden v. Parsons*, 1 Eden, 148.

(y) 2 Bro. Chanc. Cas. 117.

(z) *Doyle v. Blake*, 2 Sch. & Lef. 239, 240.

costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

And by sect. 24: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action."

And by sect. 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer, or join in transferring, any such annuity or deposit as aforesaid (*a*), or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid (*a*), or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

And by sect. 23: "For the purposes of this Act the legal personal representatives of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Before the passing of the Married Women's Property Act, 1882, if a *feme sole*, being an executrix or administratrix, wasted the goods of her testator or intestate and then married, her husband was liable, as long as the coverture lasted, for the *devastavit* (*b*). But, upon her death his liability ceased: And such being the principle of law, Courts of Equity have held that they could not establish any rule upon the difference

Liability of husband and *feme covert* executrix for *devastavit* before Married Women's Property Act, 1882: before marriage:

(*a*) See sect. 6 of the Act.

(*b*) *Kings v. Hilton*, Cro. Car. 603; *Heyward's Case*, Moore, 761; *Lumley v. Hutton*, 1 Roll. Rep. 268, 269; *Bachelor v. Bean*, 2 Vern. 60; Com. Dig. Baron and Feme (N.); *Palmer v. Wakefield*, 3 Beav. 227; cf. liability of husband or his executor for debts of wife, *ante*, p. 1386, and in respect of wife's fraud or tort, *ante*, p. 1389.

whether the husband had or had not received a portion with his wife (c).

It must, however, be observed, that if the wife was entitled to any *choses in action*, which the husband did not reduce into possession in her lifetime, so that it became necessary for him to take out administration to her, he was liable, as her administrator, for her *devastavit*, by virtue of the statute 30 Car. II. c. 7 (d).

during
coverture:

With respect to the *devastavit* of the wife committed during the coverture, the husband was liable in law and in equity, as long as both parties were alive, for the acts of his wife as executrix or administratrix: for, as she had no power to act alone, his assent was presumed (e): And it was held, that the husband, though living separate from his wife, should be charged with her *devastavit* (f). If the assets were wasted, during the coverture, either by the husband or wife, a creditor or legatee of the testator might, it would seem, sue the wife as well as the husband, and if she predeceased him, her estate was answerable (g).

Upon the death of the wife, the general rule at law was, that the liability of the husband (except as her administrator) for his wife's *devastavit*, committed as well during coverture as before, ceased (h).

husband's
liability after
coverture for
assets come
to his hands:

But in equity, the surviving husband was liable for whatever assets came to the hands of his wife, or his own hands, during the coverture; upon the principle that all persons coming into possession of property bound by a trust are chargeable in equity as trustees: The cases establishing this head of equity are collected and commented upon by Lord Redesdale in his elaborate judgment in *Adair v. Shaw* (i), in which case his Lordship held, that where a *feme covert* obtained administration, and the goods were wasted during

liability of
his estate
where the
wife sur-
vives.

(c) *Adair v. Shaw*, 1 Sch. & Lef. 263.

(d) See *ante*, p. 1340.

(e) *Adair v. Shaw*, 1 Sch. & Lef. 266.

(f) *Paget v. Read*, 1 Vern. 143.

(g) *Kingham v. Lee*, 15 Sim. 401, by Shadwell, V.-C.

(h) *Adair v. Shaw*, 1 Sch. & Lef. 261; 1 Saund. 219, *d*, note to *Wheatley v. Lane*. Likewise, if the goods of the testator remain *in specie* in the hands of the husband, the party entitled to them may, after the death of the wife, bring an action of trover or detinue against the husband to recover them: 1 Sch. & Lef. 262.

(i) 1 Sch. & Lef. 243. See also *Clough v. Bond*, 3 My. & Cr. 499; 8 Sim. 594.

coverture, and the husband died, his assets were chargeable in equity for the waste committed during coverture. So in *Smith v. Smith* (*k*), Romilly, M. R., said it was settled law that a husband was liable for all the assets received or *devastavit*s committed, either by himself or by his wife during the coverture, in respect of an estate of which his wife was legal personal representative, and that in this respect the husband was liable at law during his life and his estate after his death (*l*).

On the subject of the accounts of an executor or administrator, there has already been occasion to state, that he must account for all profits which have accrued in his own time, either spontaneously, or by his acts, out of the estate of the deceased (*m*). Therefore, if an executor has a lease for years which yields profits to the value of 20*l.* a year, rendering rent of 10*l.* a year, he shall account for 10*l.* a year, as assets (*n*). So if the executor carries on the trade or business of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his Will, or under the direction of the Court of Chancery, the profits must be accounted for as assets (*o*). Where the executors employ the assets in carrying on the trade for their own benefit, the legatees are entitled, at their option, to interest at 5 per cent. on the amount of assets employed, or the profits actually made (*p*). An executrix who held the residue of the testator's estate in trust for herself for life and after her death for the children of the testator, entered into a fresh partnership with two other persons and brought in the testator's assets as part of the capital of the firm, the other partners having notice of the trusts of the testator's Will, and it was held that the executrix and the other partners were bound to make good to the children the assets of the testator employed in trade, together with all profits, or else with interest

Executors
accounts:

they shall
account for
all profits:

(*k*) 21 Beav. 385, 387.

(*l*) See also *Charlton v. Coombes*, 4 Giff. 382.

(*m*) *Ante*, p. 1271. So he must account for all profits derived from his office as executor, as where he abandons it in favour of another for a valuable consideration: *Sugden v. Crossland*, 3 Sm. & G. 192.

(*n*) Godolph. Pt. 2, c. 24, s. 1; Com. Dig. Assets (O.).

(*o*) *Ante*, p. 1271 *et seq.*, and p. 1412; *Palmer v. Mitchell*, 2 M. & K. 672; *Willett v. Blanford*, 1 Hare, 253.

(*p*) *Wedderburn v. Wedderburn*, 22 Beav. 100; *post*, p. 1473.

at 5 per cent., at the option of the children (*q*). And it is still the rule of the Court that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment, or, at the option of the *cestuis que trust*, be charged with interest at the rate above mentioned (*r*). It will be observed that in *Flockton v. Bunning* (*s*) the transaction was not a mere loan in breach of trust as in *Stroud v. Gwyer* (*t*) and *Vyse v. Foster* (*u*), but an embarking of trust funds in a partnership business, and that all the partners were cognizant of the breach of trust and were defendants in the suit. It will also be observed that in the case of *Vyse v. Foster*, the partnership business in which the estate of the dead partner was embarked was duly wound up and the share of the dead partner ascertained, and the case therefore did not fall within the class of cases of which *Crawshay v. Collins* (*x*), *Brown v. De Tastet* (*y*), *Yates v. Finn* (*z*), are leading authorities. And the executor may be made to account for and pay over the profits, although the persons in partnership with whom he had made those profits are not made parties to the suit. So in the case of surviving partners who are the executors of the deceased partner, and who continue the trade after his death, employing his assets, they must account for the profits made by such employment (*a*), and it makes no difference that they have taken a security for it in the form of a mortgage of the real and personal property belonging to the partnership (*b*). It will be observed that, in the cases referred to, the relation of the executors and surviving partners was that of partners. In the case of *Vyse v. Foster* (*c*), the terms of the articles of partnership were such that on the death of any partner his share was to be taken by the surviving partners at a price to be ascertained from the last stocktaking, and to be paid by instalments extending over two years with interest at 5 per cent. from his death. The testator appointed three executors,

(*q*) *Flockton v. Bunning*, L. R. 8 Ch. 323, note.

(*r*) *Re Davis*, [1902] 2 Ch. 314.

(*s*) L. R. 8 Ch. 323, in note to *Vyse v. Foster*.

(*t*) 28 Beav. 130.

(*u*) L. R. 8 Ch. 309; L. R. 7 H. L. 318.

(*x*) 15 Ves. 218.

(*y*) Jac. 284.

(*z*) 13 C. D. 839.

(*a*) *Wedderburn v. Wedderburn*, *ubi supra*; *Townend v. Townend*, 1 Giff. 201.

(*b*) *Ibid.*

(*c*) L. R. 8 Ch. 309.

one of whom was one of his partners in the business, and another some years after his death became a partner, and the third never was concerned in the business. The relation, therefore, between the executors and surviving partners was that of creditor and debtor (*d*), and the executors allowed the price payable by the surviving partners to remain outstanding on the personal security of persons engaged in trade: one of the executors at first and afterwards two of them being engaged in such trade as partners and having the use of the moneys so left in their hands. This the Court held to be, at least technically, a breach of trust, and James, L. J., in dealing with the liability incurred by the executors by this breach of trust says: "If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest. If an executor or a trustee makes profit by improper dealing with the assets or trust fund, that profit he must give up to the trust: if that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear or cannot be made to appear what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent." (*e*). The learned Lord Justice then pointed out that in the case in question it did not appear, and could not be made to appear, what profits were attributable to the employment of the trust money in the business, and the Court held that the plaintiff, who was one of the *cestuis. que trustent*, was not entitled to any account of profits, the mere delay by executors in calling in any debt due to the testator's estate from the firm of which some of the executors were members not giving his estate any right to share in the profits of the business.

This decision of the Court of Appeal was affirmed by the House of Lords (*f*), and Lord Cairns, L. C., in delivering his opinion said: "If a partner in a trading firm dies, and if he constitutes one or more of his co-partners his executors, and if there is nothing special in the contract of co-partnership, and if the assets of the testator are not withdrawn from the co-part-

(*d*) See sect. 43 of the Partnership Act, 1890, set out *post*, p. 1469.

(*e*) L. R. 8 Ch. 329.

(*f*) L. R. 7 H. L. 318.

nership but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold that the estate of that testator is to all intents and purposes entitled to the benefit of a share of the profits which are made in the trade after his death (*g*). And if this should happen, which is the principle of another class of cases, that the partnership articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price, to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which if accepted and acted upon, must be acted upon according to the terms on which it is given; if in a case of that kind the surviving partners, or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, then again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place" (*h*). Lord Cairns, after pointing out that on the facts of the particular case before the House the plaintiff was not entitled to an account of the profits, proceeded thus: "I am bound to say that it appears to me that whenever a case shall occur in which relief upon the footing of an account of profits ought to be given, if it should appear that the executors of a deceased partner, acting along with surviving partners, have deliberately and without justification employed the assets of the testator in the trade of the partnership, I should expect to find that the Court of Chancery would be prepared to hold that all partners, not merely those who are executors of the testator, but also the surviving partners who are not executors, would be liable to account for profits made by the employment of that which to the knowledge of all of them is trust money which ought not to have been so applied. But I have not heard of any case, and I have not been able to find any case—for I put aside the case of *Brown v. De Tastet* (*i*) by reason of the great peculiarity of the facts of that case—where one surviving partner, being an executor, has been made answerable for the whole of the profits

(*g*) See now sect. 42 (1) of the Partnership Act, 1890, *post*, p. 1469.

(*h*) See now sect. 42 (2) of the Partnership Act, 1890.

(*i*) *Jac.* 284.

made in the trade by the employment of the capital of the testator, those profits being received not merely by the executor but by other partners not brought before the Court nor subjected to any liability under the decree."

And now sect. 42 of the Partnership Act, 1890, provides as follows:—

S. 42 of the Partnership Act, 1890 (53 & 54 Vict. c. 39).

(1.) "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets.

(2.) "Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

And sect. 43 of the same Act provides that, "subject to any agreement between the partners the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

S. 43 of the same Act.

In *Simpson v. Chapman* (*k*), where the surviving partners admitted the executor into the firm in his individual character, and the business was carried on without employing, in any way, any part of the assets of the testator, it was held that he was not liable to account for profits as assets (*k*). On the other hand, in *Cook v. Collingridge* (*l*), a sale of a testator's share in a partnership trade, and the property belonging to

(*k*) 4 De G. M. & G. 154.

(*l*) Jacob, 607. See 27 Beav. 456, note.

Director.

Purchasing
assets.

it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his *aliquot* proportion of the subsequent profits as if the partnership had continued (*m*). An executor is qualified to be a director of a company by virtue of his being the registered holder of his testator's shares (*n*), and it would seem that the remuneration received by him as director is not a profit arising out of the estate of the deceased and that he is not liable to account for it (*o*). It is a general rule that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*p*). So if an executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them, the benefit shall go to the party who is entitled to the surplus (*q*). So in a case

(*m*) "One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand": By Lord Eldon, Jacob, 621. See accord. *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 11; *Willett v. Blanford*, 1 Hare, 253. See also *Portlock v. Gardner*, 1 Hare, 594, 603.

(*n*) *Grundy v. Briggs*, [1910] 1 Ch. 444.

(*o*) *Re Dover Coalfield Extension*, [1908] 1 Ch. 65.

(*p*) *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, Madd. & Geld. 153; *ante*, p. 699; *Smedley v. Varley*, 23 Beav. 358. See *De Cordova v. De Cordova*, 4 App. Cas. 692. In *Clark v. Clark*, 9 App. Cas. 733, it was held by the Privy Council that a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as, for instance, by proving the Will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. And see *Hordern v. Hordern*, [1910] A. C. 465, *ante*, p. 700.

(*q*) *Anon.*, 1 Salk. 155; *Ex parte James*, 8 Ves. 346. Where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies, it was admitted that the transaction could not be sustained for the benefit of the executor; and it was also held that the deed of assignment did not operate as a release of the estate, and could not be upheld, as against the legatees who executed it, for the benefit of their co-legatees: *Barton v. Hassard*, 3 Dr. & W. 461.

where the executor of a mortgagee for a term of years purchased the equity of redemption in fee for a small sum in his own name, and for his own benefit, it was held that he was a trustee of the fee for the benefit of the testator's estate (*r*).

Again, if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby (*s*), he must account to the estate for all the benefit (*t*). Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation: that if there be any loss he must replace it; but he cannot possibly be a gainer by it: any gain must be for the benefit of his *cestui que trust* (*u*).

This may be the proper place to inquire, under what circumstances executors or administrators shall be charged with interest on the assets retained in their hands. There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate: 2nd. That he himself has made use of the money, or has committed some other *misfeasance*, to his own profit and advantage (*x*).

in what cases
executors are
charged with
interest:

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs (*y*), especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that according to the ordinary course of the Court, the fund is not considered distributable until after that time (*z*). But if the Court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the Court will charge the executor with interest (*a*). And it seems,

(*r*) *Fosbrooke v. Balguy*, 1 M. & K. 226; Sug. V. & P. 14th edit. p. 708.

(*s*) See *ante*, p. 1428.

(*t*) *Adye v. Feuilletau*, 1 Cox, 24.

(*u*) *Piety v. Stace*, 4 Ves. 622; *Crosskill v. Bower*, 32 Beav. 86.

(*x*) *Rocke v. Hart*, 11 Ves. 59, 60; *Tebbs v. Carpenter*, 1 Madd. 306, 307; *Kildare v. Hopson*, 4 Bro. P. C. 550, Toml. edit.; *Lincoln v. Allen*, 4 Bro. P. C. 553, Toml. edit.; *Ashburnham v. Thompson*, 13 Ves. 401, *ante*, p. 1439.

(*y*) See *Dawson v. Massey*, 1 Ball & B. 231.

(*z*) *Forbes v. Ross*, 2 Cox, 115, 116, by Lord Thurlow.

(*a*) *Littlehales v. Gascoyne*, 3 Bro. Ch. C. 73; *Brown v. Southouse*, 3

that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out (*b*). But an executor shall not be charged with interest for a balance in his hands, retained under a fair apprehension of his right to it (*c*).

rate of
interest.

As to the rate of interest which the executor shall pay, the rule until recently was that in those cases, where negligence alone was imputable to him, he should be charged with 4l. per cent. in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the Will, or from his general duty, where the Will is silent on the subject (*d*).

Bro. Ch. C. 108; *Franklin v. Frith*, 3 Bro. Ch. C. 433; *Hall v. Hallett*, 1 Cox, 134; *Seers v. Hind*, 1 Ves. 294; *Longmore v. Broom*, 7 Ves. 124; *Ashburnham v. Thompson*, 13 Ves. 401; *Turner v. Turner*, 1 Jac. & W. 39; *Goodchild v. Fenton*, 3 Y. & Jerv. 481; *Stafford v. Fiddon*, 23 Beav. 386; *Johnson v. Prendergast*, 28 Beav. 480. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount: *Jones v. Morrall*, 2 Sim. N. S. 241, 252. See also *Davenport v. Stafford*, 14 Beav. 319. The executors may be charged with interest on balances, though not claimed by the bill: 1 Jac. & W. 39. See *Jones v. Morrall*, 2 Sim. N. S. 241.

(*b*) *Franklin v. Frith*, 3 Bro. Ch. C. 434; 1 Madd. 305. It was resolved by Sir Joseph Jekyll, in *Taylor v. Gerst*, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it: But in *Newton v. Bennet*, 1 Bro. Ch. C. 361, Lord Thurlow said that an executor had an honest discretion to call in a debt bearing interest, if he thought the same in hazard. It should seem that he ought to lay it out again immediately in authorised security.

(*c*) *Brucere v. Pemberton*, 12 Ves. 386. So as to money paid away under a mistake as to the legal right to it: *Saltmarsh v. Barrett*, 31 Beav. 349. But in the case of *Re Hulkes*, 33 C. D. 552, this decision, viz., that executors who, acting *bonâ fide*, have distributed the assets upon what turns out to be an erroneous construction of the Will are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, was disented from by Chitty, J., as departing from the principle established in *Att.-Gen. v. Köhler*, 9 H. L. C. 654, and *Att.-Gen. v. Alford*, 4 De G. M. & G. 843. An administrator *pendente lite* was not liable to pay interest upon a balance in his hands during the pendency of the suit in the Ecclesiastical Court: *Gallivan v. Evans*, 1 Ball & B. 191. Nor, if an administrator complies with an order for payment into Court of the balance representing payments disallowed in his accounts in the action, is he, in the absence of special circumstances, chargeable with interest thereon: *Re Jones*, [1897] 2 Ch. 190. The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him: *Blogg v. Johnson*, L. R. 2 Ch. 225.

(*d*) *Dornforth v. Dornforth*, 12 Ves. 130, note (29), 2nd edit.; S. C. cited 1 Madd. 302; *Ashburnham v. Thompson*, 13 Ves. 401; *Rocke v. Hart*, 11 Ves. 58, 60, 61; *Tebbs v. Carpenter*, 1 Madd. 307; *Sutton v. Sharp*, 1 Russ. Ch. C. 151; *Melland v. Gray*, 2 Coll. 295; *Re Hulkes*, 33 C. D. 552.

The practice, however, was recently adopted by all the Judges of first instance in the Chancery Division, in similar cases of charging the executor with interest at 3 per cent. instead of 4 (e); but *quære* whether, having regard to the present financial position, the old rule ought not to be resorted to and the executor charged with 4 per cent (f). In order to induce the Court to charge the executor with more than the ordinary rate, a special case, such as a direct breach of trust, is necessary (g).

2nd. With respect to the employment of the assets by an executor to his own advantage, Lord Hardwicke, on two occasions (h), expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this doctrine has been entirely overruled by more modern cases (i). And it is now established, that if the executor makes use of the money, he ought to pay the interest he made (k); upon the principle just above considered, that he ought not to derive any profit from the trust property (l). Hence it has become a settled rule that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5 per cent. (m). If the fund is employed in trade, the *cestuis que trustent* have a right to an option of taking either the interest or the profits which have arisen from the trade (n): but they must elect to take either the profits for the whole period, or the interest for the whole period (o). Where an executor embarks

Where executor employs assets for his own advantage.

(e) See *per* Stirling, J., in *Re Barclay*, [1899] 1 Ch. 674, 686, in which case 3 per cent. was the rate charged. See also *Wyman v. Paterson*, [1900] A. C. 271, 279, 289.

(f) See *Re Beech*, [1920] 1 Ch. 40.

(g) *Tebbs v. Carpenter*, 1 Madd. 290, 303; *Mousley v. Carr*, 4 Beav. 49; *Hosking v. Nicholls*, 1 Y. & Coll. Ch. C. 473, 489. See *De Cordova v. De Cordova*, 4 App. Cas. 692; *Re Barclay*, [1899] 1 Ch. 674.

(h) *Adams v. Gale*, 2 Atk. 106; *Child v. Gibson*, 2 Atk. 603.

(i) *Perkins v. Baynton*, 1 Bro. C. C. 375; *Newton v. Bennet*, 1 Bro. C. C. 361; *Forbes v. Ross*, 2 Bro. C. C. 439; *Tebbs v. Carpenter*, 1 Madd. 304.

(k) *Forbes v. Ross*, 2 Cox, 116; *Rocke v. Hart*, 11 Ves. 60.

(l) *Ante*, p. 1465.

(m) *Mousley v. Carr*, 4 Beav. 49; *Re Davis*, [1902] 2 Ch. 314, where Farwell, J., held that 5 per cent. was still the rate chargeable in such cases.

(n) *Burden v. Burden*, cited 1 Jac. & Walk. 134; *Wedderburn v. Wedderburn*, 22 Beav. 100; *ante*, p. 1465.

(o) *Heathcote v. Hulme*, 1 J. & W. 122. In *Vyse v. Foster*, L. R. 8 Ch. 309, 334, which was a case in which a daughter of the testator, a beneficiary under the Will, was asking for an account of profits,

his testator's funds in trade without authority, it would seem that in no case will interest be charged against him at less than 5 per cent. (*p*). It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed (*q*). And it would seem to be now settled, that an executor, who, being a trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increases the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5 per cent. (*r*).

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5 per cent. interest. Thus in *Forbes v. Ross* (*s*),

having been credited with interest at 5 per cent. on her share of trust moneys, which consisted of the ascertained share of the testator left in breach of trust in the business in which he had been a partner, James, L. J., says: "It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must elect between them, and it might be a grave question whether the plaintiff must not either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiate the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have been held in *Jones v. Foxall*, 15 Beav. 388. The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require very full consideration before the Court came to a final decision on it."

(*p*) *Heathcote v. Hulme*, 1 J. & W. 134, 135. See also *Robinson v. Robinson*, 1 De G. M. & G. 257, by Lord Cranworth; and *Re Davis*, [1902] 2 Ch. 314. There is a dictum which seems to imply the contrary in *Rocke v. Hart* (1805), 11 Ves. at p. 61.

(*q*) *Docker v. Somes*, 2 M. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; *Willett v. Blanford*, 1 Hare, 253; *Portlock v. Gardner*, 1 Hare, 594, 603.

(*r*) *Treves v. Townshend*, 1 Bro. Ch. C. 385; *Rocke v. Hart*, 11 Ves. 61; *Sutton v. Sharp*, 1 Russ. Ch. C. 151, 152; *Re Jones*, 49 L. T. 91. Although the Will authorized the executor to invest the residue on "good private securities": *Westover v. Chapman*, 1 Coll. 177. See also *Re Hilliard*, 1 Ves. 90; *Melland v. Gray*, 2 Coll. 295; *Williams v. Powell*, 15 Beav. 461. But see *contra*, *Perkins v. Baynton*, 1 Bro. Ch. C. 375; *Brown v. Southouse*, 3 Bro. Ch. C. 107. See *Burdick v. Garrick*, L. R. 5 Ch. 233, as to what is employment of money in business.

(*s*) 2 Cox, 113; *S. C.*, 2 Bro. Ch. C. 430.

there was an express trust, by a direction in the Will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable; so that they were at liberty, using their discretion soundly and fairly and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent: they lent the fund to one of themselves, on bond at 4 per cent., when 5 per cent. might have been made by heritable or government securities: And it was held, that he should be charged with 5 per cent. interest. So in *Piety v. Stace* (t), the Will directed the executor to place the money in the public funds or upon mortgages or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode: The executor called in part of the property which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the Will, and he lent part to his son: And Lord Alvanley directed an account of all the executor had made, with interest at the rate of 5 per cent. upon the balances in his hands. In *Pocock v. Reddington* (u), the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the stock replaced or the money produced by the sales, with interest at 5 per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct (x). In *Mosley v. Ward* (y), an executor who unnecessarily called in property held by him in trust for infants which was out upon good security at 5 per cent., and who kept large balances in his hands which he used as his own, was ordered by Lord Eldon to be charged with interest at 5 per cent. and costs. In *Bick v. Motley* (z), the master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate: and that the sums so received by them were debts provable under their

(t) 4 Ves. 620.

(u) 5 Ves. 794.

(x) See also *Bate v. Scales*, 12 Ves. 402.

(y) 11 Ves. 581.

(z) 2 M. & K. 312.

respective commissions; both executors having become bankrupt: Sir C. Pepys, M. R., said, that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the Court, with interest at 5 per cent. upon the sums which he had enabled his co-executor to receive: And his Honour accordingly made an order, that interest at that rate should be added to the principal sums to be proved against the bankrupts' estates respectively (a). In *Jones v. Foxall* (b) and *Williams v. Powell* (c), Romilly, M. R., stated the rule as established by the authorities, that if an executor has retained balances in his hands, which he ought to have invested, the Court will charge him with simple interest at 4 per cent. (d) on the balances; but if in addition to such retention he has committed a direct breach of trust, or been guilty of misconduct, he will be charged after the rate of 5 per cent. (e). So in *Re Davis* (f) where a trustee improperly used a trust fund in his own business the Court declined to give less than 5 per cent. as the interest chargeable in such cases.

But in the later case of *The Attorney-General v. Alford* (g), Lord Cranworth, C., said he could not understand the principle on which the Court can proceed *in pænam* to punish the executor for his misconduct by making him account for more interest than he has received: and his Lordship stated his opinion to be, that the Court ought, in the case of an executor who has money in his hands which he ought to invest and does not invest, to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it: and the learned judge added, that misconduct did

(a) See also *Munch v. Cockerell*, 9 Sim. 339, 351; confirmed as to charging the trustees with interest at 5 per cent., by Lord Cottenham, 5 M. & Cr. 178, 220.

(b) 15 Beav. 388.

(c) 15 Beav. 461.

(d) Since reduced to 3 per cent.: *vide ante*, p. 1473.

(e) See also the rule stated by the same judge in *Knott v. Cottee*, 16 Beav. 80.

(f) [1902] 2 Ch. 314.

(g) 4 De G. M. & G. 483, 851, 852. Cf. *Burdick v. Garrick*, L. R. 5 Ch. 233, 241. The principle, established in the above case of *Att.-Gen. v. Alford*, and also in that of *Att.-Gen. v. Köhler*, 9 H. L. C. 654, was approved of in *Re Hulkes*, 33 C. D. 552; *ante*, p. 1472, note (c).

not seem to him to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result: And his Lordship proceeded to hold (varying a decree of Stuart, V.-C.) (*h*), that an executor who for several years had retained funds in his hands uninvested, which he ought to have invested, was chargeable only with simple interest at 4 per cent., there being no circumstance to lead to the conclusion that he had made any profit by his misconduct: If indeed it had appeared that he had improperly used the money for his own purposes, the Court would not inquire what had been the actual proceeds of his speculation, but would infer he either did make 5 per cent., or ought to be estopped from saying that he did not (*i*).

As a general rule, the Court decrees the computation of simple interest to be made (*k*). But there are instances in which an executor has been charged with compound interest. Thus in *Raphael v. Boehm* (*l*), a legacy was given to the executor, with a declaration in the Will, that such a legacy should be in full for the trouble he might have in performing the duties of the Will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof: The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c. of each child, and the surplus should be accumulated: the executor did not lay the money out as directed, but kept upwards of 30,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the Will, which prohibited retainer and directed accumulation: And Lord Loughborough decreed, that an account should be taken from the moment of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly

Instances of
compound
interest.

(*h*) 2 Sm. & G. 488.

(*i*) See accord. *Mayor of Berwick v. Murray*, 7 De G. M. & G. 497, 519, in which case Lord Cranworth said that it was a mistake to suppose that he had laid it down in *Att.-Gen. v. Alford* that a defaulting trustee could never be charged with more than 4 per cent. And see *Vyse v. Foster*, L. R. 8 Ch. 309, 333; *Re Davis*, [1902] 2 Ch. 314.

(*k*) *Robinson v. Cumming*, 2 Atk. 410.

(*l*) 11 Ves. 92; 13 Ves. 407, 590.

upon the balance, including intermediate interest: so that double compound interest was given: The cause came on afterwards before Lord Eldon, upon exceptions to the Master's report, and though his Lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. So in *Knott v. Cottee (m)*, where there was an express trust for accumulation, Romilly, M. R., held that, though the circumstances were not such as to make it right to charge the executor with more than 4 per cent. interest on moneys which he had improperly invested, yet it was a case for annual rests. And other instances, where, in executors' accounts, interest has been given with rests, will be found in the cases cited in the note below (*n*). And it was held by Romilly, M. R., on two occasions (*o*), that if an executor employs the assets in trade or speculation, for his own benefit, he shall be charged either with the profits actually so obtained by him for the use of the money, or with compound interest at 5 per cent.

His Honour, however, observed, that the principle on which executors have been charged with compound interest has not been clearly defined, nor are the decided cases by any means free from obscurity or contradiction. The principle of some of them seems to have been, that the Court ought to visit the executor as it were with a penalty, when he has not merely misconducted himself, but has derived, or tried to derive, a profit for himself from the use of the money. And it has not unfrequently been said, that in order to make out a claim for compound interest, a very strong case of violation of duty is required (*p*). But there has already been occasion to mention that Lord Cranworth repudiated the doctrine of *punishing* the executor, and maintained the principle, with respect to compound as well as simple interest, that the Court ought to charge him only with the interest which he has received, or which the

(*m*) 16 Beav. 77. This case was followed by Stirling, J., in *Re Barclay*, [1899] 1 Ch. 674, except that the rate of interest charged in that case was 3 per cent. only. Cf. also *Re Emmet's Estate*, 17 C. D. 142, and *Re Davis*, *supra*.

(*n*) *Stackpoole v. Stackpoole*, 4 Dow, 209; *Willson v. Carmichael*, 2 Dow & Clark, 58; *Walker v. Woodward*, 1 Russ. Chanc. Cas. 107; *Townend v. Townend*, 1 Giff. 201; *Walrond v. Walrond*, 29 Beav. 586. See also, on this subject, *Binnington v. Harwood*, 1 Turn. & R. 481; and Lord Brougham's judgment in *Docker v. Somes*, 2 M. & K. 655.

(*o*) *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *ibid.* 461.

(*p*) See *Crackelt v. Bethune*, 1 Jac. & Walk. 586; *Tebbs v. Carpenter*, 1 Madd. 290.

Court is justly entitled to say he ought to have received, or to presume he did receive (*q*).

It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the Master "to make annual rests" in taking the account: In *Heighington v. Grant* (*r*), Lord Langdale, M. R., after reviewing all the authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests, followed by a direction that the party shall be charged with interest, "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year: And his Lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham, C., his Lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account (*s*).

On the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale (*t*).

On setting aside sale to trustee no interest to be charged on rents and profits received by him.

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office (*u*), except those which arise from his own default (*x*).

Allowances to executor: for his expenses:

(*q*) *Att.-Gen. v. Alford*, *ante*, p. 1476.

(*r*) 5 M. & Cr. 258.

(*s*) *Heighington v. Grant*, 5 M. & Cr. 258.

(*t*) *Silkstone Co. v. Edey*, [1900] 1 Ch. 167.

(*u*) *Potts v. Leighton*, 15 Ves. 277; *Hyde v. Haywood*, 2 Atk. 126; Trustee Act, 1893, s. 24, *ante*, p. 1457. In these should be included the expenses of keeping up the testator's domestic establishment for a reasonable time after his death: *Field v. Peckett*, 29 Beav. 576.

(*x*) *Pannel v. Fenn*, Cro. Eliz. 348. He shall not be allowed the costs of an action against him as executor, which he ought never to

for his
trouble:

But it is a general principle, that an executor or administrator shall have no allowance, at law or in equity, for personal trouble and loss of time in the execution of his duties (*y*). Nor is the case altered by the executor's renunciation of the executorship, and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs (*z*). And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands: the Court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged, as tending to dissipate the property (*a*). So a surviving partner, being executor, is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death (*b*); and even where there is an express power the executor is not entitled to an allowance as against creditors (*c*). Again, in *New v. Jones* (*d*), it was held by Lord Lyndhurst, C. B., that if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his bill of costs for such services: it would be placing his interest at variance with the

have defended: *Chambers v. Smith*, 2 Coll. 742; *Smith v. Chambers*, 2 Phil. Ch. C. 221.

(*y*) *Robinson v. Pett*, 3 P. Wms. 251; *Scattergood v. Harrison*, Mosely, 130; *Brocksopp v. Barnes*, 5 Madd. 90.

(*z*) *Robinson v. Pett*, 3 P. Wms. 249.

(*a*) *Gould v. Fleetwood*, 3 P. Wms. 251, note (A). So in *Ayliffe v. Murray*, 2 Atk. 58, two persons, executors and trustees under a Will, would not prove the Will, nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay 100*l.* to one executor, and 200*l.* to the other, within six months after they should have exhibited an inventory: Lord Hardwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs.

(*b*) *Burden v. Burden*, 1 Ves. & B. 170; *Stocken v. Dawson*, 6 Beav. 371. Nor is an executor and legatee of such surviving partner: *Ibid.* Cf. sect. 39 of the Partnership Act, 1890.

(*c*) *Re Salmen*, 107 L. T. 108.

(*d*) Exchequer, August 9th, 1833. The writer is indebted to the kindness of Mr. Younge, for the note of this decision, which is inserted in 9 Bythewood's Convey. pp. 337, 338. It is also reported in a note to *Cradock v. Piper*, 1 Mac. & G. 668.

duties he has to discharge (e). Accordingly in *Moore v. Frowd* (f), Lord Cottenham held, that a trustee, who is a solicitor, is entitled to be repaid such costs, charges and expenses only as he has properly paid out of his pocket; and that it makes no difference in this respect, that the instrument creating the trust may have directed that the trust moneys should be applied (*inter alia*) in payment of all expenses, disbursements and charges to be incurred, sustained or borne by the trustee, in professional business, journeys or otherwise, and that the trustee might retain all reasonable costs, charges and expenses which he might sustain or be put unto, such costs, charges and expenses to be reckoned, stated, and paid as between attorney and client. Again, in *Collins v. Carey* (g), where business relating to a trust estate had been transacted by two solicitors in partnership, one of whom was a trustee of the estate, Lord Langdale, M. R., held, that, in passing the accounts of the trustee, costs out of pocket alone could be allowed (h). And the general rule, that a trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket, has been firmly established by several subsequent decisions (i). And the rule is

Trustee acting as solicitor merely entitled to costs out of pocket:

(e) See also *Willson v. Carmichael*, 2 Dow & Clark, 51; 1 Mac. & G. 678, 679; *Nicholson v. Tutin*, 3 Kay & J. 159.

(f) 3 M. & Cr. 45.

(g) 2 Beav. 128.

(h) And the rule is the same, though the business be done by one of the partners who is not trustee: *Christophers v. White*, 10 Beav. 523.

(i) *Fraser v. Palmer*, 4 Y. & Coll. 515, *coram* Alderson, B.; 1 Mac. & G. 679; *Re Sherwood*, 3 Beav. 338; *Bainbridge v. Blair*, 8 Beav. 588; *Todd v. Wilson*, 9 Beav. 486. The costs in such cases, of a defendant, are ordered to be taxed as between solicitor and client, without any special directions: *York v. Brown*, 1 Coll. 260: And under such an order, or under an order to tax costs generally, the taxing masters may take notice that the solicitor is also a trustee, and apply the rule: *Cradock v. Piper*, 1 Mac. & G. 664. But the rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative character, from being allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive: *Burge v. Brutton*, 2 Hare, 373. See *Re Taylor*, 18 Beav. 165. And it must be observed, that the rule does not disentitle a solicitor, who is a trustee, from claiming his professional charges under a special contract, nor under a Will authorizing him expressly to make such charges: *Re Sherwood*, 3 Beav. 341; *Christophers v. White*, 10 Beav. 524, by Lord Langdale. See also *Broughton v. Broughton*, 5 De G. M. & G. 166, by Lord Cranworth; *Harbin v. Darby*, 28 Beav. 325; *post*, p. 1488. Where, however, a testator by his Will authorized any trustee thereof who might be a solicitor, to make the usual professional or other proper and reasonable charges for all business done and time expended in relation to the trusts of the Will, whether such business was usually

not restricted to cases of express trusts, but applies to the case of an executor or trustee, though there be no express trust (*k*).

But the rule does not apply to the costs incurred *in a suit* where the solicitor acts in the suit for himself and his co-trustees: In such a case he shall be allowed the full costs which would be properly chargeable by a stranger to the trust, taking care that they are not to be increased by his being one of the parties (*l*).

but not as to costs incurred in a suit where solicitor acts for himself and co-trustees.

within the business of a solicitor or not, it was held that the taxing master had power to allow a trustee, who was a solicitor, the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate: *Re Ames*, 25 C. D. 72; and cf. also *Re Fish*, [1893] 2 Ch. 413. But where the direction of the Will was that one of the executors should continue to act as solicitor in relation to the property and affairs of the testatrix, and should make his *usual* professional charges, and receive the same remuneration for business done as if he were not an executor, it was held that all items which were not of a strictly professional character ought to be disallowed: *Re Chapple*, 27 C. D. 584. And a clause in a Will entitling a trustee or executor, being a solicitor, "to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of the estate, and carrying out the trusts, powers, and provisions of the Will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person," was held to enable a trustee to charge for any work done for the estate in the course of his profession or business, whether done in the ordinary course thereof or not, but not to authorize him to charge for work done outside his profession or business: *Clarkson v. Robinson*, [1900] 2 Ch. 722. To entitle an executor being a solicitor to charge for work which, although not professional work, he could have charged for against a client who was not an executor, there must be express words in the Will showing that such was the testator's intention: *Re Challinder and Herington*, [1907] 1 Ch. 58. Where a solicitor-trustee is an attesting witness of a Will, a declaration that he shall be allowed profit costs for transacting the business of the trust estate will not entitle him to such costs, the right to take such costs being a beneficial interest within sect. 15 of the Wills Act: *Re Barber*, 31 C. D. 665, approved by the Court of Appeal in *Re Pooley*, 40 C. D. 1. So, if the estate be insolvent, a clause in the Will empowering the solicitor to charge profit costs will not entitle him to them, such clause being in effect a legacy: *Re White*, [1898] 1 Ch. 297; 2 Ch. 217; *post*, p. 1484. Compensation may, in special cases, be made, under the authority of the Court, to a trustee acting as solicitor in the trust matters; though not by allowing him to make the usual professional charges: *Bainbrigge v. Blair*, 8 Beav. 588.

(*k*) *Pollard v. Doyle*, 1 Drew. & Sm. 319.

(*l*) *Cradock v. Piper*, 17 Sim. 41; 1 Mac. & G. 664. See also the observations of Lord Cranworth on this case in *Broughton v. Broughton*, 5 De G. M. & G. 164, 165; and see *Re Barber*, 34 C. D. 77. This question of the right of a solicitor-trustee to charge profit costs was much considered by the Court of Appeal in the case of *Re Corsellis*, 34 C. D. 675. In that case it was held (1) that the firm of the solicitor-trustee was entitled to profit costs made in acting for the trustees who were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure

This exception, however, in favour of the solicitor, does not extend to a case where a solicitor, who is a trustee, acts in a suit for himself alone, or by his partner for himself alone (*m*), nor to a case of a solicitor, being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust *out of Court* (*n*). And where an executor and trustee under a Will employs his co-trustee, who is a solicitor, to transact the legal

of the Court, such costs coming within the rule of *Craddock v. Piper*; (2) that profit costs made by the firm of the solicitor-trustee when acting for a receiver appointed in an administration action, the solicitor-trustee being the defendant in the action, could not be retained by the firm, on the principle that the trustee's interest and duty conflicted; (3) that profit costs made by preparing leases and agreements for leases of parts of the trust estate could not be retained, because, although actually paid by the lessees, the solicitors were employed on behalf of the trust estate; and (4) that steward's fees of a manor which formed part of the trust estate, and of which trustees had appointed a partner in the firm steward, might be retained, even though such fees were brought into the partnership account. The Court of Appeal, in this case, while disapproving of the decision in *Craddock v. Piper*, expressly refused to depart from a rule so long followed, or to fritter away the decision by saying that it only applied to a hostile action. Cotton, L. J., in his judgment (p. 681), thus sums up the general principle: "It is a well-established rule, and one founded on sound principles, that a trustee who is a solicitor, cannot as a rule, make any profits as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. There is one very obvious principle which applies, namely, that the trustee must discharge his duty without making any profit out of it. If there is business which a layman cannot properly perform, he may employ a solicitor to do that legal business. If it is business which a trustee in his position cannot be expected to discharge, such as receiving rents from a number of small properties, he may employ an agent to collect those rents, but if he chooses to do work, he cannot make a charge against the estate; that is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well. From the rule I have stated one exception was established by *Craddock v. Piper*: that is to say, where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there is an obvious reason—that it is not the business of a trustee although he is a solicitor, to act as solicitor for his co-trustee. But the exception in *Craddock v. Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit." But a solicitor cannot be entitled to profits made directly or indirectly through his office of trustee, unless he is actually the solicitor on the record. He cannot stipulate for a commission with a firm of solicitors to whom he introduces the trust business: *Vipont v. Butler*, W. N. (1893) 64.

(*m*) *Lyon v. Baker*, 5 De G. & Sm. 622.

(*n*) *Lincoln v. Windsor*, 9 Hare, 158.

business of the trust, the solicitor is only entitled to costs out of pocket (o).

A solicitor, who is sole executor and trustee of a Will, is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the Will contains a clause declaring that he should be the solicitor to the estate, and should be allowed to charge for work done as such solicitor; for the clause is in effect a legacy of profit costs to the solicitor, and being bounty he cannot claim it as against creditors. And this rule extends to all professional trustees (p).

When
executor
entitled to
commission.

An agent, who is appointed executor of his principal, is not entitled to charge commission on business done subsequently to the testator's death (q). So an executor, who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate (r). So an executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission (s). But where a testator, a victualler, directed his trade to be carried on by his executors, brewers and spirit merchants, who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them, the Court would not declare that the executors were entitled to receive the cost price only for these supplies, but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price (t). So in *Willis v. Kimble* (u), a testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he declared, that his trustees respectively should be entitled to have and receive out of the trust-moneys, all costs, charges, and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts, or in anywise relating thereto: One of the trustees was a land surveyor, and he superintended the management and sale of the estates: And Lord Langdale, M. R., held, that he was

(o) *Broughton v. Broughton*, 5 De G. M. & G. 160; 2 Sm. & G. 422.

(p) *Re Thorley*, [1891] 2 Ch. 613; *Re White, Pennell v. Franklin*, [1898] 1 Ch. 297; 2 Ch. 217; *Re Brown*, [1918] W. N. 118.

(q) *Sheriff v. Axe*, 4 Russ. Chanc. Cas. 33.

(r) *Heighington v. Grant*, 5 M. & Cr. 258, 262.

(s) *Kirkman v. Booth*, 11 Beav. 273. Nor if he is a partner with others, can the partnership make a charge: *Matthison v. Clarke*, 3 Drew. 3.

(t) *Smith v. Langford*, 2 Beav. 362, disapproved in *Sykes v. Sykes*, [1909] 2 Ch. 241.

(u) 1 Beav. 559.

entitled, upon the terms of the Will, to a compensation for loss of time. Again, it is competent for the Court to appoint an executor and trustee consignee with the usual profits (*x*). And when the Court, in its discretion, has made such an appointment, and the appointment has been acted upon, the Court will not afterwards withdraw its sanction from it (*y*).

The Judicial Trustee Act, 1896 (*z*), now provides that, where a judicial trustee is appointed, there may be paid to him out of the trust property such remuneration, not exceeding the limits prescribed by the rules for the time being in force under the Act, as the Court may assign in each case, subject to any rules under the Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and that the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

Judicial
Trustee Act,
1896, s. 1 (5).

It has been holden that agents, being also appointed executors, are not entitled to commission upon remittances from India to this country by the testator, not received until after his death (*a*). The Courts of India, in order to induce proper persons to accept the office of executor, at one time adopted a rule, opposed to the principles above stated, by permitting an executor to charge a commission upon the amount of assets collected by him in India. And if assets, collected in India, came to be administered, not in India, but by the Courts in England, the Courts here were of necessity bound to follow that rule of policy which was adopted in India. But by the Indian Act, No. II. of 1874, re-enacting Act No. XXIV. of 1867, it is provided (sect. 56) that no person other than the Administrator-General, acting officially, shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* granted by the Supreme Court or High Court of Judicature at Fort William in Bengal, since the passing of Act No. VII. of 1849, or by either of the Supreme

Commission
on remitt-
ances from
India to this
country by
testator.

(*x*) *Marshall v. Holloway*, 2 Swanst. 432.

(*y*) *Morison v. Morison*, 4 My. & Cr. 215.

(*z*) 59 & 60 Vict. c. 35, s. 1 (5).

(*a*) *Hovey v. Blakeman*, 4 Ves. 596. However, in *Scattergood v. Harrison*, Mosely, 130, Lord King held, that where a factor was made executor, if anything appeared to have been consigned to him by the testator in his lifetime, though it came to his hands after his death, since the executor acted as factor, he should be allowed commission for it.

or High Courts of Judicature at Madras and Bombay, since the passing of Act No. II. of 1850, or by any Court of competent jurisdiction within the meaning of sects. 187 and 190 of the Indian Succession Act, 1865; but this enactment shall not prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise. Sections 52—55 prescribe the commission to which the Administrator-General is entitled (*b*).

The same exception to the general rule was established with respect to the West Indies. The principle upon which the Court of Chancery has gone, in this respect, appears to be this: That the commission is in the nature of a remuneration to a trustee, who, besides the usual trouble belonging to the execution of his trust, has also to undergo all the inconveniences arising from being in a foreign country, and conducting the business of a merchant there: And although, as it has above appeared, no commission is allowed to a trustee in this country for what he does, however laborious his duty may be, yet inasmuch as it is of great importance to get persons to assume the character of trustees in the East and West Indies, therefore, so long as they are actually in the country there discharging the duty of trustees, the Court allows the commission (*c*). But no commission is payable where the remittant himself is actually, at the time of the remittance, in this country (*d*): And it would seem, that, in order to entitle himself to the commission, the party must himself be actually in the colony where the remittance was made: For if, by any means, money, which has not been received by him upon the spot and remitted by him from the spot to this country, is remitted to this country, it appears to be the settled rule of the Court of Chancery, that the commission shall not be allowed (*e*). And accordingly, in *Campbell v.*

(*b*) See a pamphlet by Mr. Broughton, late Administrator-General of Bengal, on "The Custody and Preservation of the Property in India of Deceased Persons."

(*c*) 1 Moo. P. C. 40.

(*d*) 4 Ves. 72; *Ibid.* 596.

(*e*) *Chambers v. Goldwin*, 5 Ves. 834; *Denton v. Davy*, 1 Moo. P. C. 15, 32. In this last case it was holden by the Lords of the Privy Council, that the commission of 6 per cent. given by the Jamaica Act, 24 Geo. II. c. 19, to agents, trustees, guardians, executors, &c., for the management and disposal of the rents and profits of an estate, being in the nature of a remuneration for the trouble and responsibility of conducting the business of a merchant on the island, is payable only to persons actually resident on the island, and capable

Campbell (f), it was held that if an executor in India collected part of the assets there, and then came to England, and had the remainder remitted to him by his agent, he was entitled to commission on that part only which he had collected in India.

In the Australian colonies a commission or percentage may be and generally is allowed to executors and administrators, and in many of the colonies there are incorporated companies which act as executors and charge commission (g).

Although an executor who has proved the Will, or a person taking out letters of administration, cannot retire from his duty, but must, generally speaking, collect the estate himself (h), yet an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ a collector: and the executor will, therefore, be allowed the expense so incurred, in his accounts (i). Accordingly, where a testator gave annuities to his executors for their trouble in the execution of his Will, and died possessed of several houses, let at weekly rents, it was held, that the executors were justified in paying a person to collect the rents, and did not, therefore, lose their annuities (k). So if there are assets in India, the executor shall be allowed the expense of an agent to collect them: And, therefore, the Court will appoint a receiver in

Allowances
for payments
to collectors,
&c.

and willing to act in the trusts of the estate; and the commission of 5 per cent. given by the same Act for receiving and remitting moneys can only be claimed where the receipts or payments are actually made on the island.

(f) 13 Sim. 168.

(g) See Walker on Executors, 5th ed., p. 305.

(h) *Weiss v. Dill*, 3 M. & K. 26.

(i) See *Bonithon v. Hockmore*, 1 Vern. 316; *Davis v. Dendy*, 3 Mad. 170. See also *Hopkinson v. Roe*, 1 Beav. 180, in which case Lord Langdale, M. R., held, that the executors under the circumstances were justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble: But the costs of transferring funds, from the name of a testator into the names of the executors, were disallowed: And his Lordship held, that the sum to be allowed executors for the expenses of transferring a large sum of money into Court is one guinea; and extra brokerage was, therefore, disallowed. But where an executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock-broker for identifying him (the executor) at the bank, it was held, that he ought to be allowed this payment: *Jones v. Powell*, 6 Beav. 418.

(k) *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237. S. P., as to an administrator, *Trezevant v. Frazer*, Hil. Term, 1832, before Sir L. Shadwell, V.-C. So, even at law, it would seem, that an executor, under a plea of *plene administravit*, will be allowed the reasonable charges of collecting the testator's debts: *Giles v. Dyson*, 1 Stark. N. P. C. 32.

India of a testator's assets on the application of an executor resident in England (*l*).

So from the nature of the accounts, the executor may be justified in employing an accountant, and the expense will in a proper case be allowed to the executor (*m*).

Executor
may employ
a solicitor:

Again, if an executor pays an attorney for his trouble and attendance, in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays (*n*). But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bonâ fide*, to the solicitor to the trust; and the officer of the Court, without regularly taxing the bill, will moderate their amount (*o*). And it may here be observed, that an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself. And therefore, where a solicitor is appointed executor, and is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances, to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees and creditors (*p*).

but he will
not be
allowed
charges of
solicitor for
doing things
which exe-
cutor ought
strictly to do
himself.

Solicitors
Act, 1843
(6 & 7 Vict.
c. 73), s. 39:
Taxation on
application
of a party
interested.

Under sect. 39 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), in any case in which a trustee, executor, or administrator has become chargeable with any solicitor's bill of costs the judge has a discretionary power, upon the application of a party interested (*q*) in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same to be fixed and settled, and to make such order as he may think fit for the payment of what may be found due, and of the costs of the reference, to or by the solicitor by or to

(*l*) *Cockburn v. Raphael*, 2 Sim. & Stu. 453: But the receiver must give sureties resident in England: *Ibid*.

(*m*) *Henderson v. M'Iver*, 3 Madd. 275.

(*n*) *Macnamara v. Jones*, Dick. 587. In *Stackpoole v. Stackpoole*, 4 Dow. P. C. 226, an administrator was not allowed to set off a charge for poundage alleged to have been paid to his agent in the administration.

(*o*) *Johnson v. Telford*, 3 Russ. Chanc. Cas. 477.

(*p*) *Harbin v. Darby*, 28 Beav. 325; *Re Chapple*, 27 C. D. 584. For the general rule as to an executor's costs, and as to his "charges and expenses," and what are "just allowances," see *post*, p. 1535 *et seq*.

(*q*) A creditor who has obtained judgment for the administration of the estate of a deceased testator is "a party interested" within the meaning of this section: *Re Jones and Everett*, [1904] 2 Ch. 363.

the party making such application, having regard to the provisions in the Act contained relative to applications for the like purpose by the party chargeable with such bill so far as the same shall be applicable to such cases; or the order may be made for payment to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such solicitor in respect of such bill he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such solicitor had. If the bill has already been taxed and settled, sect. 40 requires special circumstances to be shown to entitle the applicant to a retaxation; and under sect. 41 special circumstances should be shown for an order for taxation after payment of the bill. Orders under sect. 39 are made on summons, and not *ex parte* (r). The taxation is as between solicitor and client, but subject to this limitation, that a solicitor cannot charge against a trust estate anything not necessary for the administration thereof, though expressly directed by the trustee, but must look for payment of such charges to the trustee personally (s). The amount allowed by a taxing master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate (t). By virtue of the proviso in sect. 41, taxation will not be ordered under sect. 39 where the application is not made within twelve calendar months after payment; regard being had to what must now be treated as the settled practice of the Court (u): But the trustee, executor, or administrator may be made to account in an action, in which case the taxing master, without having it referred to him for taxation, would be directed to inquire whether any items objected to were fair and proper to be allowed, and to what amount (x). So also if a solicitor carries in a claim in an administration action in respect of a bill of costs delivered more than twelve months the executor is not estopped from disputing any of the items (y).

(r) *Re Strafard*, 16 Beav. 27.

(s) *Re Brown*, L. R. 4 Eq. 464; and cf. *Re Negus*, [1895] 1 Ch. 73; *Re Gray*, [1901] 1 Ch. 239; and *Re Longbotham & Sons*, [1904] 2 Ch. 152, where same principle was recognized on a taxation under sect. 38.

(t) *Brown v. Burdett*, 40 C. D. 244.

(u) *Re Wellborne*, [1901] 1 Ch. 312.

(x) *Allen v. Jarvis*, L. R. 4 Ch. 616.

(y) *Re Park*, 41 C. D. 326.

Allowance of interest to executor for money advanced by him.

With respect to the allowance of interest to executors upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay the debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled not only to be paid in full in priority to the creditors (*b*), but also to an allowance of interest for the money so advanced or borrowed (*c*). It may be observed, that it is contrary to the course of practice to allow interest to an executor on costs paid by him, pending a suit regarding the estate (*d*). Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report, notwithstanding that the postponement may give rise to hardship; for, until that time, it cannot be ascertained that the executor had not the money in his hands (*e*).

Executor receiving money, to which he is not entitled, must refund, although he has paid it away to creditors.

In *Pooley v. Ray* (*f*), a mortgage came to an executor who received the mortgage-money, and paid it away to his testator's creditors: Afterwards it appeared, that the mortgage had been satisfied in the testator's lifetime: And Lord Cowper held, that the executor must refund, although he had before paid the money away in debts, which he had not otherwise assets to pay, and that he must have his remedy against such creditors as by mistake he had paid: His Lordship observed, that "though this might be a hard case, yet if the plaintiffs had a right to be paid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant, the executor, applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away, in debts of his testator, will not excuse him from paying it back. So in the same manner, if there were a decree

(*b*) *Spackman v. Holbrook*, 2 Giff. 198; *Re Jones*, [1914] 1 Ch. 742, *ante*, p. 794.

(*c*) *Small v. Wing*, 5 Bro. P. C. 72 Toml. edit.

(*d*) *Gordon v. Trail*, 8 Price, 416; *Lewis v. Lewis*, 13 Beav. 82.

(*e*) *Gordon v. Trail*, 8 Price, 416.

(*f*) 1 P. Wms. 355. But where an administrator, without notice of the bankruptcy of the intestate, distributed the assets among the next of kin, it was held that the administrator was not liable, but that the next of kin must refund to the trustee in bankruptcy: *Re Bennett*, [1907] 1 K. B. 149.

for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts, and then the defendant, against whom the executor had recovered the decree, brings an appeal, and reverses the decree; the plaintiff in the appeal shall be restored to the money."

This doctrine of Lord Cowper was approved of by Lord Alvanley, in *Pickering v. Stamford* (*g*), but his Lordship remarked, that it would be otherwise, if the defendant had delayed the appeal, and willingly stood by, while the executor paid away the money; for that would be drawing the executor into a snare.

It may be proper in this place to mention the case of *Brown v. Spooner* (*h*). There the testator gave an annuity of 50*l.* to be purchased by his executor, and directed him to pay the annuitant 40*l.* a year until it was purchased: The executor, instead of purchasing, paid 50*l.* a year from the testator's rents: And Lord Thurlow held, that although the executor was bound to purchase the annuity immediately after the expiration of the first year from the testator's death, and therefore the Court might charge him for the overpayment from the estate, yet the Master, on a general reference of just allowances, could not do so. So in *Garland v. Littlewood* (*i*), a case was alleged, on the pleading, to charge executors for what they might, but for their wilful default, &c., have received: At the hearing the common accounts only were directed against them: The case coming on for further directions on the Master's report, Lord Langdale, M. R., held that the executors would not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry.

Just allowances are now made in any account directed by any order or judgment without any direction for the purpose (*k*). Accounts, on the basis of wilful default, are still not made on a common administration judgment or order (*l*), but the principle laid down in *Garland v. Littlewood* seems to have been departed from. The old practice was that a decree on the footing of wilful default could not be got except at the hearing; now it

What an executor may be charged with under a reference of just allowances.

When an executor may be charged on the footing of wilful default.

(*g*) 2 Ves. 583.

(*h*) 1 Ves. 291.

(*i*) 1 Beav. 527.

(*k*) R.S.C. 1883, Ord. XXXIII., r. 8.

(*l*) *Laming v. Gee*, 10 C. D. 715.

seems, that if wilful default is charged in the pleadings and evidence of it is adduced, accounts and inquiries on that footing may be directed at any stage of the proceedings, although the judgment at the trial gives no relief on that footing, provided, however, the claim to such relief has not been dismissed (*m*).

By Ord. XXXIII. r. 2 of R. S. C. 1883, it is provided that:—"The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

This rule does not enable a Judge to make an order against an executor or administrator on the footing of wilful default either at the hearing or at any subsequent time, unless wilful default has been pleaded; but where wilful default has been alleged and a case is made for it on the pleadings, an account on the footing of wilful default can be directed either at the hearing or trial of the action or at any subsequent stage (*n*).

If wilful default has not been charged in the pleadings and in the course of the inquiries directed a case of wilful default is disclosed, it would seem that by the leave of the Court fresh proceedings may be taken charging wilful default in the same way in which, under the old practice, a supplemental bill could be filed (*o*). But it is not necessary to prove that the information on which the fresh action is founded was not acquired in time to make use of it in the former proceeding (*oo*).

Where the account directed by the order is what is known as a "common account," the trustee is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received. Consequently, if an investment is made in improper securities not authorised by the terms of the Will or the general

(*m*) *Re Symons*, 21 C. D. 757; cf. *Re Wrightson*, [1908] 1 Ch. 789.

(*n*) *Barber v. Mackrell*, 12 C. D. 534, 538, *per* Fry, J. See also *Job v. Job*, 6 C. D. 562, as explained in *Mayer v. Murray*, 8 C. D. 424; *Re Symons*, 21 C. D. 757.

(*o*) *Laming v. Gee*, 10 C. D. 715. And see *Dowse v. Gorton*, [1891] A. C. 190, 204, *per* Lord Macnaghten.

(*oo*) *Re Kurtz*, 90 L. T. 12.

law, the trustee is not allowed to discharge himself on account of that investment, and he is charged in respect of it on the common account. To this extent a breach of trust can be dealt with on originating summons, notwithstanding the rule that in any contested case an originating summons is not the proper mode of deciding the question (*p*).

(*p*) *Re Stuart*, 74 L. T. 546; *Re Newland*, W. N. (1904) 181.

PART THE FIFTH.

REMEDIES.



BOOK THE FIRST.

REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

IN a previous part of this Treatise (*a*), there has been occasion to investigate, what rights of action are comprised in the estate of an executor or administrator: It remains to consider the remedies by which those rights may be enforced.

It has been thought desirable in the following four chapters to keep the former headings "At Law" and "In Equity."

CHAPTER THE FIRST.

REMEDIES FOR EXECUTORS AND ADMINISTRATORS AT LAW.

Instances
where the
executor has
not the
remedy.

IT must be observed, in the commencement of this subject, that there are some cases where an executor or administrator, although he has an interest in a *chose in action*, is not entitled to the remedy: Thus, where one of two *joint* obligees, covenantees (*b*), or partners dies, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined (*c*), nor can he sue separately: For example, two joint merchants appoint a person to be their factor: one dies, leaving an executor; this executor and the survivor cannot join in an action against the

(*a*) *Ante*, p. 604 *et seq.*

(*b*) See as to the effect of a covenant with two or more jointly, sect. 60 of the Conveyancing Act, 1881.

(*c*) See generally as to joinder of parties, R. S. O., Ord. XVI.

factor; for the remedy survives, though not the duty; and therefore, on the recovery, the survivor must be accountable to the executor for that (*d*). And the general rule is that though the right of a deceased partner devolves on his executor (*e*), yet the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (*f*).

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives, upon the death of the latter, and the executor or administrator of the deceased cannot be made a party, or sue separately: Thus, in *Anderson v. Martindale* (*g*), there was a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life: and it was held, that this was a joint covenant to A. and B., in which they had joint legal interest, although the benefit was for A. only; and that therefore, on the death of A., the right of action survived to B., and A.'s administrators could not sue on the covenant (*h*).

It follows, that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him cannot be joined.

But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living: And if the interest be several, it shall make no difference that the language of the covenant is joint: Thus, in *Withers v. Bircham* (*i*), by deed reciting the grant of two distinct annuities

(*d*) *Martin v. Crump*, 1 Lord Raym. 340; 2 Salk. 444.

(*e*) *Ante*, pp. 495, 638.

(*f*) *Martin v. Crump*, *ubi supra*; *Kemp v. Andrews*, Carth. 171; *Golding v. Vaughan*, 2 Chit. Rep. 437, *per cur.*; *Rex v. Collectors of Customs*, 2 M. & S. 225, by Dampier, J.; 2 Saund. 117, note to *Coryton v. Litheby*. Cf. *ante*, p. 1355, as to the case of *Hall v. Huffam*, 2 Lev. 228.

(*g*) 1 East, 497.

(*h*) See *Barford v. Stuckey*, 2 Brod. & Bingh. 333.

(*i*) 3 B. & C. 254; cf. *Eccleston v. Clipsham*, 1 Saund. 154; and see *White v. Tyndall*, 13 A. C. 263, in which the House of Lords refused to treat a joint covenant in a lease as several, merely because the demise was to two as tenants in common. And Lord Fitzgerald pointed out that the rule that the covenant shall be measured and moulded according to the interest of the covenantees had no application to the case of separate interests in covenantors. Where, however,

to A. and B. during the life of the grantors and the survivor, it was witnessed, that C. covenanted with A. and B. and their executors, to pay the annuities, or either of them, when the grantors should make default in payment: A. died: And it was held, that, the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship above stated will be enforced, although the covenant be in terms joint and several (*k*).

The rule is the same with respect to remedies in form *ex delicto* as those in form *ex contractu*: Therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately (*l*).

Executor of
solicitor
bringing
action on
his bill:

taxation of
bill of
deceased
solicitor.

By the 37th section of the stat. 6 & 7 Vict. c. 73, it is enacted that no action shall be brought by any attorney or solicitor, or *by their executors, administrators, or assignees*, for the recovery of any fees, &c., until the expiration of one month after the delivery of a bill, &c., and upon the application of the party chargeable (*m*) with the bill delivered, the bill and the attorney's or solicitor's, *or his executor's or administrator's*, or assignee's demand thereon, may be referred to be taxed; and if the bill, when taxed, be less by a sixth part than the bill delivered, then the attorney, his *executor, administrator, or assignee*, shall pay the costs (*n*).

A payment made by the solicitor to an executor for the

two persons agreed to assign certain patents, and the assignments were to "contain a covenant by the vendors" that the patents were valid, &c., it was held that the covenants ought to be joint and several, and the administratrix of one of the covenantors was held liable: *National Society v. Gibbs*, [1900] 2 Ch. 280 (C. A.).

(*k*) See the authorities cited in the note to *Eccleston v. Clipsham*, 1 Saund. 154. See also 3 B. & C. 256; and *Lane v. Drinkwater*, 1 Cr. M. & R. 599, where, however, the covenant was joint only.

(*l*) *Ante*, p. 633.

(*m*) The personal representative of the party chargeable, though not named, may also make the application: *Jefferson v. Warrington*, 7 M. & W. 137.

(*n*) If a solicitor dies pending an order for taxation, the proceedings may be revived by the client against the solicitor's representatives by an *ex parte* order: *Re Nicholson*, 29 Beav. 665; and they may, in the same way, revive the proceedings against the client: *Re Waugh*, *ibid.* 666.

purpose of obtaining probate is not a disbursement within sect. 37 and ought not to be included as such in the solicitor's bill of costs (*nn*).

By sect. 38 where any person, not the party chargeable, shall be liable to pay or shall have paid the bill, he or his personal representative may apply to have it taxed just as if the application were made by the party chargeable (*o*).

If there are several executors or administrators, they must all Parties. join in bringing actions at law (*p*), though some be within the age of seventeen years (*q*), or have not proved the Will (*r*). Where, however, an executor renounces probate, or, being cited to take probate, does not appear, his rights in respect of the executorship shall wholly cease, and the representation of the testator devolve as if he had not been appointed (*s*), and he, therefore, need not be a plaintiff. Nor is an absconding executor a necessary party (*t*).

But if one alone of several executors or administrators brought an action either in form *ex contractu* or *ex delicto*, the defendant could formerly only take advantage of it by pleading in abatement (*u*).

Now by R. S. C., 1883, Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement, and by Ord. XVI. r. 11, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court

(*nn*) *Re Kingdon and Wilson*, [1902] 2 Ch. 242.

(*o*) As to taxation under sect. 39, upon the application of a party interested, see *ante*, p. 1488.

(*p*) Bro. Exors. 88; but see Conv. Act, 1911, ss. 8, 11.

(*q*) *Smith v. Smith*, Yelv. 130.

(*r*) *Brookes v. Stroud*, 1 Salk. 3. See, as to the necessary parties to an action by executors in equity, *post*, p. 1523.

(*s*) 20 & 21 Viet. c. 77, s. 79; 21 & 22 Viet. c. 95, s. 16; *Re Bouchereux*, [1908] 1 Ch. 180.

(*t*) *Drage v. Hartopp*, 28 C. D. 414. As to parties generally, see R. S. C. 1883, Ord. XVI., *post*, p. 1527.

(*u*) 1 Saund. 291, *l. note*; *Tuckey v. Hawkins*, 4 O. B. 655. Apparently, since the Judicature Act, the only mode of taking the objection of non-joinder of one of several executors as a plaintiff is by taking out a summons to add the executor as a plaintiff: *Werderman v. Société Générale d'Electricité*, 19 C. D. 246. The objection cannot be raised by plea in abatement or by demurrer, and the Court will never dismiss an action for want of parties. In some cases, if a person who ought to be a plaintiff refuses, the Court will make him a defendant: *Luke v. South Kensington Hotel*, 11 C. D. 121; *Gandy v. Gandy*, 30 C. D. 57.

or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff, suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto."

It must be observed that if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor (*x*). So if goods be taken out of the possession of one of several executors, he may sue alone to recover them (*y*). And, generally, if one executor alone contracts on his own account alone, he *must* sue alone on such contract, notwithstanding the money recovered will be assets (*z*).

It is clear that where two out of three co-executors grant a lease of their testator's property, as the whole estate is in each, the whole property passes, and the two alone may recover the property in ejectment on a joint claim (*a*).

Process.

Indorsement
of writ.

Executors
may sue and
be sued as
representing
the estate.

Formerly, though the plaintiff sued as executor or administrator, the writ of summons need not have stated his special character. But R. S. C., 1883, Ord. III. r. 4, provides that if the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement of claim shall show in what capacity the plaintiff or defendant sues or is sued. And Ord. XVI. r. 8, provides that "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be

(*x*) Godolph. Pt. 2, c. 16, s. 1; Wentw. Off. Ex. 224, 14th edit.; *Brassington v. Ault*, 2 Bingh. 177.

(*y*) Godolph. *ubi supra*; Wentw. Off. Ex. *ubi supra*.

(*z*) *Heath v. Chilton*, 12 M. & W. 632, *ante*, p. 660.

(*a*) *Doe v. Wheeler*, 15 M. & W. 623.

made parties either in addition to or in lieu of the previously existing parties" (*l*). By R. S. C. November, 1893, this rule was amended so as to be made expressly applicable to trustees, executors, and administrators sued in proceedings to enforce a security, by foreclosure or otherwise (*c*).

By R. S. C. 1883, Ord. XVIII. r. 5, it is enacted that, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator" (*cc*).

Claims by or against an executor as such, may be joined with claims by or against him personally.

Every action brought by an executor or administrator, where the cause of action accrues in the time of the deceased, must be brought in his representative capacity (*d*). But where the cause of action accrues after the death of the testator or intestate, the executor or administrator may sue as such, or not, at his option (*e*). Thus, there has already been occasion to show (*f*), that, in respect of injuries done to the goods and chattels of the testator, after his death, the executor has his option, either to sue in his representative capacity or to bring the action in his own name and in his individual character. So it has already appeared, with respect to contracts made with the executor or administrator in that character, that the same option exists, wherever the money recovered will be assets (*g*).

Claim: when executor shall claim as such.

(*b*) Where an administration order has been made, the Judge of the Chancery Division in whose court such administration is pending may order the transfer to himself of any cause or matter pending in any other Court or Division brought by or against the executors or administrators of the testator or intestate whose assets are being administered: R. S. C. 1883, Ord. XLIX. r. 5. In *Chapman v. Mason*, 40 L. T. 678, it was decided that an action in another Division against an executor will not be transferred under this rule if he is to be deemed personally liable; but in *Re Timms*, 26 W. R. 692, the action was ordered to be transferred to the Chancery Division. The fact that a claim against the executor personally is joined with a claim against him as executor will not prevent a transfer: *Re Pimm*, *infra*.

(*c*) This rule was apparently amended in consequence of the decision in *Francis v. Harrison*, 43 C. D. 183. This rule is subject to rr. 1, 8 and 9 of the same Order (see r. 7); and see *Whitworth v. Darbyshire*, 68 L. T. 216. Rr. 1, 8 and 9 of Ord. XVIII. relate to the subject of the joinder of different causes of action.

(*cc*) The rule will be strictly construed; it is not a question of convenience: *Tredegar v. Roberts*, [1914] 1 K. B. 283; and see *Re Pimm*, [1916] W. N. 202.

(*d*) 1 Saund. 112, note to *Dean of Bristol v. Guyse*; Com. Dig. Pleader (2 D. 1); *Gallant v. Bouteflower*, 3 Dougl. 33, by Buller, J.

(*e*) 3 Dougl. 36, by Buller, J. (*f*) *Ante*, p. 656 *et seq.*

(*g*) *Ante*, p. 658 *et seq.* See also *Abbott v. Parfitt*, L. R. 6 Q. B. 346; *Moseley v. Rendell*, L. R. 6 Q. B. 338.

Profert of letters of administration or probate unnecessary since the Common Law Procedure Act:

oyer abolished:

It was formerly necessary for an executor, when he declared as such, to make a *profert in curiâ* of the letters testamentary; and for an administrator to make a *profert* of the letters of administration with a statement of the grant of the latter. But by the Common Law Procedure Act, 1852, sect. 55, "It shall not be necessary to make *profert* of any deed or other document relied on in any pleading, and if *profert* shall be made, it shall not entitle the opposite party to crave oyer, or set out upon oyer such deed or other document."

Before the law was thus altered, if an executor, declaring as such, made *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant, in order to raise the objection, must have demanded oyer; for if he had pleaded that the plaintiff never was nor is executor in manner and form as alleged in the declaration, the plaintiff would have succeeded on this issue, if he had obtained probate at any time before the trial (*h*); but by demanding oyer, the defendant made it impossible for the plaintiff to proceed, till he could produce the probate. The alteration of the law as to *profert* and oyer, has rendered this course impracticable; and it may place a debtor to the deceased in a situation of some hardship and difficulty, if he is sued for the debt by one assuming to be the executor of the creditor, but who has not proved the Will. For if the debtor pays the debt into Court, he may be paying it to one who perhaps may never acquire a title to it by obtaining probate, and so be forced to pay it over again: On the other hand, if he pleads *ne unques executor*, and goes to trial of an issue joined on that plea, and the plaintiff has obtained probate in the meantime, it will, by relation, sustain the plaintiff's title to maintain the action, and the debtor will have to pay all the costs of the suit, though he has never disputed the debt and always been willing to pay it, if he could ascertain the person who was authorized to receive it. In order, therefore, to protect a defendant under such circumstances, the Court, on its being shown that the plaintiff, who has declared or claims as executor, has not obtained probate, will stay proceedings until probate shall have been taken out and a reasonable time has elapsed after it shall have been submitted to the inspection of the defendant (*i*).

(*h*) *Thompson v. Reynolds*, 3 C. & P. 123. See *ante*, p. 215.

(*i*) *Webb v. Adkins*, 14 C. B. 401; *Tarn v. Commercial Banking Co. of Sydney*, 12 Q. B. D. 294.

By R. S. C. 1883, Ord. XIX. r. 3, "A defendant in an action Set-off. may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." But this rule gives no right of set-off where none existed before the passing of the rule (*k*). And the cases on the repealed statutes of set-off (2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4), which enacted that where either party sues or is sued as executor or administrator, where there are mutual debts (*kk*) between the testator or intestate and either party, one debt may be set against the other, would seem still to be applicable, except in so far as they conflict with the rules of equity. These cases have established that in an action by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator (*l*): And the same rule holds where the plaintiff claims, as *executor*, for a debt due after the death of the testator (*m*). Again, if a

(*k*) *Re Milan Tramways Co.*, 22 O. D. 122; 25 O. D. 587.

(*kk*) As to the meaning of "mutual debts," see *Bennett v. White*, [1910] 2 K. B. 643.

(*l*) *Shipman v. Thompson*, Willes, 103; *Tegetmeyer v. Lumley*, 25 G. 3, B. R., reported in Durnford's note to *Hutchinson v. Sturges*, Willes, 264. So it was held, by Romilly, M. R., that where a creditor had purchased part of the intestate's goods from his administrator, he could not set off the price against a debt due to him from the intestate at his decease: *Lambarde v. Older*, 17 Beav. 542; cf. *Wrouth v. Dawes*, 25 Beav. 369.

(*m*) *Kilvington v. Stevenson*, cited by Erskine from Yates' MS. in *Tegetmeyer v. Lumley*, *ubi supra*; *Schofield v. Corbett*, 11 Q. B. 779; *Rees v. Watts*, 11 Exch. 410, affirming *Watts v. Rees*, 9 Exch. 696, and disapproving *Mardall v. Thellusson*, which was subsequently overruled by the Court of Exchequer Chamber, 6 E. & B. 976. These decisions turned on the terms of the stat. 2 Geo. II. c. 38. The rule that a creditor of a testator cannot set off a debt due to him from the testator against a debt that became due from him to the executor of the testator is the same in equity: *Hallett v. Hallett*, 13 C. D. 232; *Lambarde v. Older*, 17 Beav. 542. Thus where G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself for his own life, and had also mortgaged a policy on his own life to the same mortgagees, to secure a sum of 4,000*l.*, and after the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy, it was held that the mortgagees had no right to set off the balance against the executor in respect of arrears of the annuity: *Re*

stranger receives rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action, by the executor, for the rents received; but he cannot deduct a payment of ground rent arising after the death of the testator (*n*).

In *Henderson v. Henderson* (*o*), an action was brought on a decree on the equity side of the Supreme Court of Newfoundland, awarding a sum of money to be paid by the defendant to the plaintiff; and the defendant, by his plea, after alleging that the plaintiff had sued in the Supreme Court, as the representative of a deceased person, proceeded to rely on a set-off for debts due from the deceased, or his estate, to the defendant: And it was held that this plea was bad; because the plaintiff was now suing in his own right, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker (*p*).

A defendant cannot set off a debt due to him from the plaintiff personally where the latter is suing in a representative character (*q*).

Neither can a defendant set up by way of counterclaim against the claim of the plaintiff suing only in a distinct personal character claims against him personally and also as an

Gregson, 36 C. D. 223. The doctrine established in the case of ordinary administrations in *Rees v. Watts*, *ubi supra*, does not apply in the case of an administration in bankruptcy: *Watkins v. Lindsay & Co.*, 67 L. J. Q. B. 362; and see *Re Peruvian Rly.*, [1915] 2 Ch. 442 (winding up). The Judicature Act, by giving defendants a right to counterclaim, does not enable a defendant who has had notice of an administration suit to rely, in the shape of a counterclaim, on such set-off, since under the provisions of stat. 23 & 24 Vict. c. 38, s. 14, the Court of Chancery would have restrained an action in respect of it, and all proceedings by the defendant on the counterclaim would consequently be stayed by the Court of the Division of the High Court of Justice in which the action is brought: *Newell v. National and Provincial Bank of England*, 1 C. P. D. 496.

(*n*) *Wilkinson v. Cawood*, 3 Anstr. 905.

(*o*) 6 Q. B. 288.

(*p*) *Beckwith v. Bullen*, 8 E. & B. 683.

(*q*) *Stumore v. Campbell*, [1892] 1 Q. B. 314 (C. A.).

executor (*r*), since Ord. XVIII. r. 5 (*s*) does not apply to a counterclaim (*t*).

Under J. A. 1873, s. 24, the Court will give effect to equitable defences and grant relief on equitable grounds, and although the rule was as fully established in equity as at law, that demands due in different rights cannot be set off,—the principle being, that one man's money shall not be applied to pay another man's debts,—yet a Court of Equity would have regard to the beneficial ownership of the debts, and would give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like (*u*). In *Jones v. Mossop* (*x*), where A. was indebted on bond to B.: B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate: The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt: A. became surety for C. by joining in promissory notes: C. became an insolvent debtor, and A. was compelled to pay the notes: C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond; it was held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt (*y*). But this case was decided on a clear admission by the defendant that the bond had become legally and equitably the property of C., that he had become the beneficial owner, and it was that beneficial ownership which had become vested in the assignee in his insolvency (*z*).

The only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to show that the ultimate balance would be his property. Therefore, where an

(*r*) *Macdonald v. Carington*, 4 C. P. D. 28.

(*s*) *Ante*, p. 1499.

(*t*) *Macdonald v. Carington*, *supra*.

(*u*) *Jones v. Mossop*, 3 Hare, 568. See also *Baillie v. Edwards*, 2 H. L. C. 74.

(*x*) 3 Hare, 568.

(*y*) It must not, however, be understood that the mere existence of cross-demands was sufficient to constitute an equitable set-off as contradistinguished from the set-off at law. It will be found that this equitable set-off exists in cases where the party seeking the benefit of it could show some equitable grounds for being protected against his adversary's demand: *Rawson v. Samuel*, 1 Craig. & Ph. 161, 178.

(*z*) See *per James, L. J.*, in *Ex parte Morier*, 12 C. D. 491, 497.

executorship account was kept with bankers in the joint names of two executors, and one of the executors, who was residuary legatee under the Will, kept another account of his own with the bankers, and the bankers filed a liquidation petition, and at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn, it was held that the one account could not be set off against the other in the liquidation of the bankers (a).

In *Bailey v. Finch* (b), where a bank stopped payment and the trustee brought an action against a customer to recover the amount for which his account was overdrawn, the customer was allowed to set off a sum due to him on an account which he had opened as executor but to which as residuary legatee he was beneficially as well as legally entitled. But in this case there was a legal right of set-off because both the accounts were the accounts of one person and at law there was a right of set-off, and it was attempted to preclude that right by the fact that one of the accounts had been opened in the name of the customer as executor. There was a legal right to set-off, and the question was whether there was a sufficient equitable ground for preventing the legal right from taking effect.

In *Bridges v. Smyth* (c), the Court of Common Pleas held, that a judgment for the plaintiff in that Court might be set off against a judgment for the defendant in the King's Bench, although the plaintiff was dead and the judgment was assets in the hands of her administrator: In that case, Mrs. Bridges had judgment against Miss Smyth in the Common Pleas, in two actions, to the amount of 81*l.* 15*s.*; and Mrs. Bridges dying after the judgments were entered up, Frowd, her attorney, who claimed to be a judgment creditor, had taken out letters of administration: Miss Smyth had a judgment in the King's Bench to the amount of 3,052*l.* against Mrs. Bridges, and Frowd was requested to set off the 81*l.* 15*s.* against the 3,052*l.*: This he refused to do, on the ground that, she being dead, and he being her administrator, the judgments in the Common Pleas were in a different right, and could not be set off without compromising the interest of the creditors: But the Court of Common Pleas ordered satisfaction to be entered on the judgment rolls in that Court, upon acknowledging satis-

(a) *Ex parte Morier*, 12 C. D. 491.

(b) L. R. 7 Q. B. 34.

(c) 8 Bingh. 29.

faction for 816*l.* 15*s.* on the judgment for 3,052*l.* in the King's Bench.

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him *as executor* or administrator to the defendant (*d*).

Where in *assumpsit* by an executor, in which all the promises were laid to be made *to the testator* in his lifetime, the defendant pleaded that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and the plaintiff replied that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication was held bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the Will; for that gave no new cause of action, and therefore the time of proving the Will is perfectly immaterial (*e*).

defence of
Statute of
Limitations:

But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the Statute of Limitations, and the plaintiff replied the special matter above mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him (*f*). So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters, and not from the time when the bills became due, there being no cause of action until there is a party capable of suing (*g*).

(*d*) *Gallant v. Bouteflower*, 3 Dougl. 34. See as to set-off generally, Ann. Prac. See also *post*, p. 1563.

(*e*) *Hickman v. Walker*, Willes, 27; 2 Saund. 63, *k*, note to *Hodsdon v. Harridge*.

(*f*) *Cary v. Stephenson*, 2 Salk. 421; 4 Mod. 372. See *Stanford's Case*, cited Cro. Jac. 61.

(*g*) *Murray v. E. I. Company*, 5 B. & A. 204. See also *ante*, p. 478; *Pratt v. Swaine*, 8 B. & C. 285; *Perry v. Jenkins*, 1 My. & Cr. 118.

It must be observed, that where, in *assumpsit* by an executor, on a contract made with *his testator*, all the promises in the declaration were laid to be made to the testator, and the defendant pleaded the Statute of Limitations, the plaintiff could not in his replication set forth a promise made to *himself* within six years, without being guilty of a departure, any more than he could in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the Statute of Limitations (*h*). Therefore, where it was necessary to rely, on an acknowledgment, made since the death of the testator, to bar the statute, counts were required in the declaration laying promises to the plaintiff as executor (*i*).

Accordingly, if an executor brought an action on a bill or note, and intended to rely on an acknowledgment or promise made to himself in order to bar the statute, he had to state in his declaration the making of the bill or note, and must then have proceeded to aver that after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator, to pay him. And where the declaration was so framed, such promise might have been denied by a plea of *non-assumpsit*, notwithstanding the rule of pleading, H. T. 1853, r. 7, that in all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* should be inadmissible: For the mere production and proof of the note would not prove the promise as made *to the executors*, as it would if the promise were laid as made *to the testator*: The right of action indeed is transferred to the executor, but no promise is implied by law to pay him; otherwise the Statute of Limitations would run from the death of the payee, and not from the time of the note becoming due: In order, therefore, to support the action, there must be an express promise to the executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it; and the cause of action is the existence of the note, *with* the express promise to the executor to pay the amount of it; whereas the rule is confined to cases where the action is *only* on the note (*k*): The effect of the plea of *non-assumpsit* was in

(*h*) *Hickman v. Walker*, Willes, 29; *Dean v. Crane*, 1 Salk. 28; *Executors of the Duke of Marlborough v. Widmore*, 2 Stra. 890; 2 Saund. 63, l.

(*i*) As to what is sufficient evidence of an account stated with the plaintiff as executor, see *Purdon v. Purdon*, 10 M. & W. 562.

(*k*) *Timmis v. Platt*, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dowl. 748; *Rolleston v. Dixon*, 2 D. & L. 892.

such a case to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

In *Clark v. Hooper* (l), payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute (m).

An executor's affidavit for probate which includes, in the list of the testator's debts, a statute-barred debt of the testator does not operate as an acknowledgment so as to take the debt out of the Limitation Act, 1623 (mm).

The statute is an answer to an action by an executor for a debt due to the testator for which he might have sued more than six years before the issue of the writ, although the action was commenced within a reasonable time after the death (n).

Where a plaintiff died, the obsolete writ by journeys accounts could not be brought by his executor (o).

Writ by
journeys
accounts.

(l) 10 Bing. 840.

(m) See, however, as to this case, the comments of Lord Herschell in *Stamford, &c. Banking Co. v. Smith*, [1892] 2 Q. B. at p. 769.

(mm) *Re Beavan*, [1912] 1 Ch. 196; *Lloyd v. Coote*, [1915] 1 K. B. 242.

(n) *Penny v. Brice*, 18 C. B. N. S. 393. If, however, a creditor dies intestate on the day on which a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt becomes payable, the statute does not begin to run against the creditor's administrator until letters of administration have been taken out: *Atkinson v. Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377, 381, in which case there was no cause of action which the testator could have maintained.

(o) *Kinsey v. Heyward*, 1 Lord Raym. 432. If a writ abated without the default of the plaintiff, he might have had a new writ by journeys accounts, i.e., *per dietas computatas*. The word *dieta* means a day's journey; and the origin of the expression is said to be that the Court of Chancery, being a movable Court, and following the King's Court, and the writs being to be purchased out of Chancery, the party was bound to apply to the King's Court as hastily as the distance of the place would allow, accounting twenty miles for every day's journey; and, for this reason, he was to show that he had purchased it as hastily as possible, accounting the days' journeys he had to the Court: 1 Lord Raym. 433; *Termes de la Ley*, Art. Journies Account; Com. Dig. Abatement, P. There are some authorities for the proposition that the writ by journeys accounts is a continuance of the former writ. But Lord Coke calls it "*quodam modo*, a continuance." And Lord Lyndhurst, C., in *Davies v. Lowndes*, 1 Phil. 328; 6 M. & Gr. 529, and the Court of Common Pleas in a further stage of the same cause (7 M. & Gr. 762), expressed a very strong opinion that it is not a continuance, strictly and properly, of the old writ, but is a new writ.

Action by executor or administrator after expiry of six years.

However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the Statute of Limitations (21 Jac. I. c. 16) (which provides for the commencement of a new action within a year after the reversal by error of a judgment for the plaintiff, or after judgment against the plaintiff, or after reversal of the outlawry of the defendant), bring a new action (*p*); provided he does it recently, or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period (*q*). In *Kinsey v. Heyward* (*r*), a year is

(*p*) *Matthews v. Phillips*, 2 Salk. 425; *Kinsey v. Heyward*, 1 Lutw. 260; 12 Mod. 568. The remedy by fresh action would seem, from the case of *Swindell v. Bulkeley*, 18 Q. B. D. 250, to be still open to executors. In this case the defendant died before a writ which had been issued was actually served, and a fresh action against his executors within a year of probate was held to lie, though in the meantime the six years had expired. But by Ord. XVII. r. 1, it is provided that "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death." By r. 2, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice." And r. 4 of the same Order is as follows: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings should be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence." An executor or administrator so joined, even after judgment, becomes personally liable to all the costs *ab initio*: *Boynton v. Boynton*, 4 A. C. 733.

(*q*) 2 Saund. 64, *a*, note to *Hodsden v. Harridge*. And see *per Lord Esher, M. R.*, in *Swindell v. Bulkeley*, 18 Q. B. D. at p. 254.

(*r*) 1 Lord Raym. 434.

said to be a reasonable time; and the Court of King's Bench appears to have been of this opinion in *Wilcox v. Huggins* (s), where it is said, that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid: Indeed, if the executor had been retarded by suits about the Will or administration, and had shown that in pleading, it would have been otherwise, because the neglect would then have been accounted for: And Lee, J., said, "I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the Court from the circumstances of the case; but generally, the year in the statute is a good direction." However, in *Lethbridge v. Chapman* (t), the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it was deemed prudent for the executor to bring a new action as soon as he possibly could after the death of his testator, and at all events not to delay it beyond a year (u). But in *Curlewis v. Lord Mornington* (x), it was expressly held, that the executor was not bound to the year, if under the circumstances he could fairly be said to have used due diligence.

The form of the replication by an executor to a plea of the statute, where he brought a new action shortly after the death of a testator, was to state, that the testator, on such a day sued out a writ of summons against the defendant, whereby he was commanded, &c. (and then continuing the writ down to the time of the testator's death); that he appointed the plaintiff as executor, and recently after his death, to wit, on such a day, &c., the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with an intent to implead him for the causes of action in the declaration specified, and

(s) 2 Str. 207; Fitzg. 170, 289.

(t) 13 Vin. 103, *in margine*.

(u) 2 Saund. 64, b, note.

(x) 7 E. & B. 283; S. C., *in error*, 27 L. J. Q. B. 439.

upon his appearance to declare against him for the said several causes of action, and that he afterwards, on, &c., declared against the defendant, &c., with an averment that the several causes of action accrued within six years next before the suing out of the writ first above specified by the testator (*y*).

Again, if an executor brought *assumpsit*, but died before judgment and the six years run, his executor might, notwithstanding, bring a fresh action, so as he brought it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case (*z*).

The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the above-mentioned case of *Kinsey v. Heyward* (*a*), is, that when once the proviso in the Statute of Limitations is complied with by the commencement of an action within due time, the party is out of the purview of the Act, and set at liberty out of the restraint of the said statute. But the true ground of these decisions appears to be that they proceed upon the equity of the 4th section of the statute, and that the Courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief (*b*). And the same equitable construction that has been applied, as above mentioned, to the 4th section of the statute of James, has been followed as to the limitation of actions on debts for rent, covenants, bonds, &c., imposed by the stat. 3 & 4 Will. IV. c. 42, s. 3 (*c*).

Where the right of action accrued to the testator during his residence abroad, and he died abroad, never having returned to this country after the accrual thereof, the statute was held to be no bar to an action by his executors, although the right of action accrued more than six years before action brought; at all events if it be brought within six years after his death (*d*), the case being saved by the 7th section of the statute of James (which provides that if the person entitled shall be abroad at the time the cause of action accrued, such person may bring his

(*y*) 2 Saund. 64, *c*, note.

(*z*) Bull. N. P. 150, *a*.

(*a*) 1 Lord Raym. 434, *ante*, p. 1508.

(*b*) *Adam v. The Inhabitants of the City of Bristol*, 2 A. & E. 385, 403.

(*c*) *Sturgis v. Darrell*, 4 H. & N. 622; *S. C.*, in error, 6 H. & N. 120.

(*d*) *Townsend v. Deacon*, 3 Exch. 706. See also *Forbes v. Smith*, 11 Exch. 161.

action within six years of his return from beyond the seas), though not strictly within the words of it.

The 7th section of 21 Jac. I. c. 16, remains unrepealed, but the principle of the cases cited in the note, which were decided upon it, must, it would seem, be treated as no longer applicable, since by sect. 10 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), absence beyond seas or imprisonment is not to entitle a creditor to any time within which to commence an action with respect to which the period of limitation is fixed by (*inter alia*) sect. 3 of 21 Jac. I. c. 16, beyond the period fixed by such statute.

By R. S. C. 1883, Ord. XXI. r. 5, it is provided that:—"If either party wishes to deny the right of any other party to claim as executor . . . or in any representative or other alleged capacity . . . he shall deny the same specifically." Denial of right of person in representative capacity.

Where the plaintiff claims in trespass or trover, on his *constructive* possession as executor or administrator, he should sue as executor or administrator (*e*).

But where the executor has been in *actual* possession of the property which was the subject of the suit, it would not be necessary for him to claim or give evidence of his title as executor or administrator, in an action against a wrongdoer (*f*).

It remains to consider, what shall be sufficient evidence of the plaintiff's title as executor or administrator, when it becomes necessary to prove it, either when the representative character of the plaintiff is specifically denied, or in a suit on a cause of action arising in the plaintiff's own time. What is sufficient proof of the plaintiff being executor, &c.:

Although the executor derives his title from the Will by which he is appointed, and not from the probate of the Will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of the property (*g*) being vested in an executor, or of the executor's appointment (*h*). Therefore, the original Will cannot be read in evidence for that purpose, although produced by the officer of the Court of Probate or Probate Division, probate:

(*e*) *Ante*, p. 216.

(*f*) *Ante*, p. 216. But see also *Waller v. Drakeford*, 1 E. & B. 49.

(*g*) Sect. 1 (3) of the Land Transfer Act, 1897, now provides for the granting of probate and letters of administration in respect of real estate only, notwithstanding that there is no personal estate.

(*h*) *Ante*, p. 207; *Hamilton v. Aston*, 1 Carr. & Kirw. 679.

unless it bears the seal of the Court, or some other mark of authentication (*i*). The seal of the Court on the probate proves itself (*k*).

When probate is lost.

If the probate is lost, it was not the practice of the Ecclesiastical Court to grant a second, but only an exemplification from the records of the Court; which would be evidence of the proving the Will (*l*). And an examined copy of the probate is evidence of the person there named being executor; because the probate is an original, taken by authority, and of a public nature (*m*).

It must be observed, that all that is required, either in the case of an executor or administrator, is to show by legitimate evidence that the Court of Probate or Probate Division has given authority to the person to administer: It is only the act of the Court that is to be proved: The probate is only a copy of this act: The original book containing the entry of the act of the Court is the original, and therefore the primary evidence: Hence the Act-book, containing an entry of a Will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being the executors, without accounting for the non-production of the probate (*n*).

And now, since it is provided by R. S. C. 1883, Order XXXVII. r. 4, that office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible, it would seem that an office copy of the record from the Probate Registry is good evidence of the executor's or administrator's title.

Proof of revocation of probate.

To prove that the probate of a Will had been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the Registrar, and which was kept as the only record of such proceedings, and of the decree of the Court, was admitted to be good evidence (*o*).

(*i*) *R. v. Barnes*, 1 Stark. N. P. C. 243; *Pinney v. Pinney*, 8 B. & C. 385. Nor is a copy of the Will evidence: Bull. N. P. 246.

(*k*) Court of Probate Act, 20 & 21 Vict. c. 77, s. 22. See also S. P. before the Act passed, *Kempton v. Cross*, Cas. temp. Hardw. 108.

(*l*) *Shepherd v. Shorthose*, 1 Stra. 412; Bull. N. P. 246.

(*m*) *Hoe v. Nelthorpe*, 3 Salk. 154; S. P. by Holt, C. J., in *R. v. Haines*, Skinn. 584; Bull. N. P. 246.

(*n*) *Cox v. Allingham*, Jacob. 514.

(*o*) *Ramsbottom's Case*, 1 Leach, Cr. C. 60, note (*c*). And see Ord. XXXVII. r. 4, *supra*.

The title of several plaintiffs, claiming as executors, is well evidenced by probate, granted to one only, of the Will appointing them all (*p*): And the rule was the same whether they sued in their representative character or not (*q*); for probate granted to one of several executors enures to the benefit of all (*r*).

The title of an administrator *de bonis non* is sufficiently proved by the letters of administration *de bonis non*, without those granted to the first executor or administrator (*s*).

Where an executor or administrator produces the probate or letters in proof of his representative character, and his case shows that he sues for a greater value than is covered by the probate or administration stamp, he cannot recover (*t*).

The title of the plaintiff, as administrator, may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Court of Probate (*u*), or Probate Division, or, without producing the letters of administration, by the original book of acts, directing the grant of the letters (*x*); or by a copy of it under R. S. C. 1883, Order XXXVII. r. 4. The original book of acts, directing letters of administration to be granted, with the Surrogate's *fiat* for the same, was held to be evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled; for the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the Court, drawn up in a more formal manner (*y*). So an examined copy of the Act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action

Proof of
letters of ad-
ministration:

(*p*) *Walters v. Pfeil*, 1 Mood. & Malk. 362; *Scott v. Briant*, 6 Nev. & M. 381.

(*q*) Mood. & Malk. 362.

(*r*) *Ante*, p. 294; *Watkins v. Brent*, 7 Sim. 512; *Cummins v. Cummins*, 3 J. & Lat. 64.

(*s*) *Catherwood v. Chabaud*, 1 B. & C. 150. See also *Gradell v. Tyson*, 2 Stra. 716.

(*t*) *Hunt v. Stevens*, 3 Taunt. 113; *Carr v. Roberts*, 2 B. & Ad. 905. See *post*, p. 1571, as to the amount of stamp being admissible evidence of assets.

(*u*) *Kempton v. Cross*, Cas. temp. Hardw. 108.

(*x*) *Ibid.*; *Elden v. Keddell*, 8 East, 187; *Ramsbottom v. Buckhurst*, 2 M. & S. 567.

(*y*) *Elden v. Keddell*, 8 East, 187; *Garrett v. Lister*, 1 Lev. 25.

against him, without giving him notice to produce his letters of administration (z).

There has already been occasion to consider how far a probate or letters of administration, when produced by the plaintiff, are conclusive upon the defendant (a). But it may be convenient, in this place, to recapitulate some of the points established on this subject.

Evidence for
defendant.

The defendant cannot prove that another person was appointed executor or administrator, or that the testator was insane, or that the Will, of which probate had been granted, was forged: for that would be directly contrary to the seal of the Probate Division in a matter within its immediate jurisdiction (b).

But it may be proved that the supposed testator or intestate is alive; for in such case, the Probate Division can have no jurisdiction (c). And it may be shown that the seal attached to the supposed probate has been forged, or that the letters have been revoked (d).

Again, the defendant may plead in his defence, that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged Will, unrepealed at the time of the payment (e). But payment of money under the probate of a supposed Will of a living person would be void; because, in such case, the Probate Division has no jurisdiction, and the probate can have no effect (f).

Whether
admissions
made by an
executor,
&c., before
appointment
are receiv-
able against
him as
executor:

It may be doubted whether admissions made by an executor or administrator, before he was clothed with that character, are receivable in evidence against him in an action brought by or against him in his representative capacity (g). However, in *Smith v. Morgan* (h), Tindal, C. J., admitted the declaration of the assignees of a bankrupt made by them before their appointment, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right (i).

(z) *Davis v. Williams*, 13 East, 232.

(a) *Ante*, p. 439 *et seq.*

(b) *Ante*, p. 440.

(c) *Ante*, p. 449.

(d) *Ante*, p. 449.

(e) *Ante*, p. 441; *Allen v. Dundas*, 3 T. R. 125.

(f) *Ibid.* 130; but see *Hewson v. Shelley*, [1914] 2 Ch. 13.

(g) See *Stewart v. Edmonds*, *ante*, p. 317, note (d).

(h) 2 M. & Rob. 257.

(i) See *contra*, *Fenwick v. Thornton*, M. & M. 51, *coram* Lord Tenterden.

The admission of one of several executors or administrators will not bind the others; at all events, unless it is made in the character of executor. Therefore, where two executors were sued as such on a covenant of their testator for quiet enjoyment, and the question was whether the defendants who had evicted the plaintiff had done so under lawful title, it was held that an admission of *one* of the defendants was no evidence of such title (*k*).

Admissions
by co-exe-
cutor.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14) made by one of several executors as executor binds the estate, and on his death an order may be made in an administration action for payment of the debt out of the assets remaining unadministered in the hands or under the control of the surviving executors (*l*).

But it was held by Stirling, J., in *Astbury v. Astbury* (*m*), that an acknowledgment by one of two executors and devisees in trust for sale of real estate against the wishes of the other, that more than six years' interest was due on a mortgage created by the testator was not to be treated as the valid act of the two in their capacity of trustees, and was not a good acknowledgment within sect. 42 of the Real Property Limitation Act, 1833.

Executors and administrators instituting or defending actions are subject to the same rules as to costs, as they would be if they were suing or defending in their own right (*n*). The awarding of costs in the Supreme Court is governed by Ord. LXV. r. 1 (*o*).

Costs.

Plaintiffs who live out of the jurisdiction of the Court may be compelled to give security for costs, though such plaintiffs sue as executors (*p*). But an administrator to whom letters

(*k*) *Fox v. Waters*, 12 A. & E. 43. See also *Scholey v. Walton*, 12 M. & W. 510.

(*l*) *Re Macdonald*, [1897] 2 Ch. 181. And see *post*, p. 1557 *et seq.*, where the effect of sect. 1 of Lord Tenterden's Act will be found discussed.

(*m*) [1898] 2 Ch. 111.

(*n*) 2 Dan. C. P., 8th edit., 1028.

(*o*) Discussed, *ante*, p. 283. See also *post*, p. 1534.

(*p*) *Chevalier v. Finnis*, 1 Brod. & Bingh. 277; *Chamberlain v. Chamberlain*, 1 Dowl. 366; *Knight v. De Blaquièrre*, Sau. & Sc. 658. In an action by two executors, one of whom is out of the jurisdiction and the other insolvent, the defendant is not entitled to a stay of proceedings until they give security for costs: *Sykes v. Sykes*, L. R. 4 C. P. 645.

of administration are granted as the attorney of a principal abroad will not, even though he is insolvent, be ordered to give security (*q*).

Remedy on
judgment
obtained by
testator.

By Ord. XLII. r. 23, it is provided: "In the following cases, viz., (a) where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly." This seems to be the proper procedure in cases where the executor seeks to issue execution upon a judgment obtained by the testator (*r*).

Until the executor or administrator had made himself a party to the judgment, he was not entitled, under the 61st section of the Common Law Procedure Act, 1854 (*s*), to attach a debt due to the judgment debtor (*t*). Whether under the Judicature Act he would be entitled to proceed under Ord. XLII. r. 23, or whether he would have to make himself a party under Ord. XVII. r. 4, would seem to depend on whether the judgment of Lord Coleridge, C. J., or that of Stephen, J., in *Fellows v. Thornton* (*u*) is right. Where a trustee in bankruptcy of a judgment creditor desires to issue execution, under Ord. XLII. r. 23, he must first be made a party under Ord. XVII. r. 4 (*v*).

Relief by
auditâ
querelâ now
abolished.

If an executor or administrator obtained judgment, and then the probate or letters of administration were revoked, the regular mode for the defendant to obtain relief was by an *auditâ querelâ* (*x*); but now, by Ord. XLII. r. 27, it is provided that "no proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply

(*q*) *Rainbow v. Kittoe*, [1916] 1 Ch. 313.

(*r*) See *ante*, p. 673; *Re Shephard*, 43 O. D. 131. If the writ of execution was issued in the testator's lifetime, it might have been executed after his death: *Ellis v. Griffith*, 16 M. & W. 106. The executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under Ord. XLII. r. 23, to issue execution on the judgment.

(*s*) 17 & 18 Vict. c. 125.

(*t*) *Holmes v. Tutton*, 5 E. & B. 65.

(*u*) 14 Q. B. D. 335. See also *ante*, p. 662, note (*m*).

(*v*) *Re Clements*, [1901] 1 Q. B. 260.

(*x*) *Turner v. Davies*, 2 Saund. 148.

to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just."

By stat. 51 & 52 Vict. c. 43, s. 95, "it shall be lawful for any executor or administrator to sue and be sued in the County Court in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in the High Court."

County
Court Act,
1888.

If the holder of a bill be dead, and the executor has not yet proved the Will, it is said that the bill must, nevertheless, be presented for payment at the regular time: but it would seem that the drawer and indorsers would not be discharged, provided presentment be made, and notice given of the dishonour, by the executor or administrator, in a reasonable time (*y*).

Presentment
of bill of
exchange by
executor.

(*y*) See Byles on Bills, 17th edit., p. 75: "If the holder be dead, and the executor have not proved the Will, still it seems that the executor is bound to present the bill when presentable, for his title to his testator's property is derived exclusively from the Will, and vests in him from the moment of the testator's death. But as the title of an administrator is derived wholly from the Court of Probate, and he has none till the letters of administration are granted, he probably would be excused by impossibility." *Ibid.* The Bills of Exchange Act, 1882, does not directly deal with the matter, but sect. 46 provides that "delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

CHAPTER THE SECOND.

REMEDIES FOR EXECUTORS AND ADMINISTRATORS IN
EQUITY.

General
equitable
rights of
executor,
&c.

Exception.

THE executor or administrator is entitled to all equitable rights and interests of the deceased and can enforce them in the same way as the deceased.

The one exception to this rule, which is founded on the maxim *actio personalis moritur cum personâ* (a), has but little application in equity: for instance, it does not prevent the executor of a person wronged from obtaining an equitable remedy by a mandatory injunction, in order to prevent the continuance of some injury to the property of a deceased person. An executor can sustain an action to have an obstruction to light removed if it affects land of his testator, although his right to damages for the injury to the real estate of the deceased may be barred, because the action was not brought within the limit of time provided by 3 & 4 Will. IV. c. 42, s. 2 (b), and where injury to the dead man's estate is shown the remedy is not confined to injunction, but extends to damages also (c).

Many rights
the executor
enforces in
the same
way as the
deceased
would have
done.

A great many of the equitable rights and interests of the deceased the executor or administrator can enforce in the Chancery Division by precisely the same form of action as the deceased would employ if he was living.

For instance, an action in equity can be successfully maintained to protect the literary property of the deceased, as in *Thompson v. Stanhope* (d), where the executors of Lord Chesterfield obtained an injunction against Mrs. Stanhope,

(a) This maxim will be found fully treated of, *ante*, p. 608; and see *Phillips v. Homfray*, 24 C. D. 439; *Re Duncan*, [1899] 1 Ch. 387.

(b) *Jones v. Simes*, 43 Ch. D. 607.

(c) For instances of protecting trade-marks, see *Hatchard v. Mège*, 18 Q. B. D. 771; *Oakley v. Dalton*, 35 Ch. D. 700.

(d) *Ambl. 734*. See also *Granard v. Dunkin*, 1 Ball & B. 207.

restraining her from publishing the letters which had been received by her husband, the natural son of Lord Chesterfield; or *Queensberry v. Shebbeare* (*e*), where the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his *History of the Rebellion*, which had been given by a former representative of the author to a person under whom the defendant claimed, but not with an intention that he should publish it.

It is not proposed in this chapter to discuss such remedies as are before mentioned; they are common to all litigants in the Chancery Division, and they do not become exceptional merely because they are adopted by executors or administrators.

Scope of this chapter.

In this chapter and in the chapter on remedies against an executor in equity it is only proposed to discuss those remedies by or against the executor or administrator which are peculiar and exceptional.

In the exceptional remedies by and against executors and administrators in equity hereinafter mentioned, questions of retainer and set-off by the executor or administrator frequently arise, but retainer and set-off are legal or statutory rather than equitable remedies, and are fully dealt with in other parts of this Work (*f*).

Retainer and set-off not exceptional remedies.

An executor or administrator, can before an administration order, pay or retain a statute-barred debt (*g*), or may admit it so as to take it out of the statute (*h*), but he cannot revive it after decree (*i*). And the Court will not order a fund to be paid out to an executor or administrator who has the legal title to a statute-barred debt merely to enable him thereby to acquire a right of retainer (*k*).

Right of executor, &c., to pay statute-barred debt.

The Statute of Limitations may be set up in resistance to an application to continue the proceedings, if the executor or administrator does not proceed within six years after the abatement of an action, provided there has been no judgment; for the Statute of Limitations cannot be applied to a judgment (*l*).

Statute of Limitations.

(*e*) 2 Eden, 329.

(*f*) *Ante*, p. 797 and p. 1501.

(*g*) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166.

(*h*) *Moodie v. Bannister*, 4 Drew. 432; *Blair v. Nugent*, 3 J. & Lat. 673.

(*i*) *Phillips v. Phillips*, 32 Beav. 26.

(*k*) *Per* Stirling, J., in *Trevor v. Hutchings*. [1896] 1 Ch. 844.

(*l*) *Hollingshead's Case*, 1 P. Wms. 742; Mitf. Pl. 272, 273, 4th edit.

If an executor or administrator, trustee for an infant, neglects to sue within six years, the Statute of Limitations binds the infant (*m*).

In the case of an administrator time runs from the death, not from grant of letters of administration.

An administrator claiming the estate or interest in lands of the deceased person of whose chattels he has been appointed administrator, is to be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration (*n*). The effect of this is, that time for the purpose of the Statute of Limitations commences to run, as against an administrator claiming a chattel interest in land, from the date of the death of the intestate and not from the date of the grant of administration (*o*). And since the passing of the Land Transfer Act, 1897, the same rule applies as against an administrator claiming a freehold interest in land vested in him under that Act.

In the case of a forged Will the statute begins to run not from the grant of probate, but from the grant of letters of administration made after and in consequence of the revocation of the probate (*p*).

Restraining proceedings in foreign Courts by injunction.

The Chancery Division has power to restrain proceedings in a foreign Court against an executor or administrator by persons within the jurisdiction (*q*) by the exercise of jurisdiction *in personam* against such persons. It will do so where proceedings are improperly or vexatiously instituted or prosecuted in the foreign Court to determine questions which ought to be adjudicated upon in this country (*r*).

This jurisdiction can be exercised whether an administration order has or has not been made (*s*).

Proceedings in a foreign Court will not be restrained on the ground of mere hardship or inconvenience (*t*).

(*m*) *Wych v. East India Company*, 3 P. Wms. 309.

(*n*) 3 & 4 Will. IV. c. 27, s. 6.

(*o*) *Re Williams*, 34 Ch. D. 558; *Re Bonsor and Smith's Contract*, 34 Ch. D. 560, note.

(*p*) *Chan Kit San v. Ho Fung Hang*, [1902] A. C. 257.

(*q*) The Court has no such jurisdiction if the persons sought to be restrained are not within the jurisdiction: *Re Boyse*, 15 Ch. D. 591.

(*r*) *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416; *Lord Portarlington v. Soulby*, 3 M. & K. 104; *Venning v. Lloyd*, 1 D. F. & J. 193; *McHenry v. Lewis*, 22 Ch. D. 397; *Hyam v. Helm*, 24 Ch. D. 531.

(*s*) *Bushby v. Munday*, 5 Madd. 297; *Baillie v. Baillie*, L. R. 5 Eq. 175; *Bunbury v. Bunbury*, 1 Beav. 336; *Cord v. Cord*, 33 Beav. 314.

(*t*) *Fletcher v. Rodgers*, 27 W. R. 96. Although judgment has been given in the foreign Court.

The staying of actions against an executor or administrator, after an administration order has been made, will be found dealt with in a subsequent chapter (u).

Stay of proceedings after administration order.

Where the executor, in an action at law against him by a creditor of the deceased, had pleaded according to the truth of the case, he was always held entitled, when the assets were taken from him and administered by the Court of Equity, to all the protection which that Court could give him against any personal liability in respect of the judgment at law (v).

But with respect to restraining a creditor from proceeding, after a decree for administration, upon a verdict or judgment recovered by him against an executor or administrator, the following distinction was taken by Lord Eldon, in *Brook v. Skinner* (x): That if the plaintiff at law had recovered judgment *de bonis testatoris*, the Court would restrain the creditor from taking execution on such judgment; and that if he had recovered *de bonis propriis*, the Court would not restrain the execution. So, in *Clarke v. Ormonde* (y), his Lordship said, that if a creditor has obtained judgment by which the executor is personally liable, *de bonis propriis*, the Court had nothing to do with it; but if a judgment *de bonis testatoris*, it certainly would be a case for an injunction. That is, that the Court would interfere to protect the assets, but not to protect the executor against any liability to which he might have personally subjected himself. And, in *Dreury v. Thacker* (z), his Lordship intimated his opinion, that there was no instance in the history of the Court of Chancery, where, after a judgment at law *de bonis testatoris*, *et si non, de bonis propriis* of an executor, and execution issued, the proceedings at law had been restrained, on a decree subsequently obtained for administration of the assets. Where the only creditor of a deceased debtor has obtained in an administration action a personal order against the executor for payment of his certified debt, the fiduciary relation between them is determined, and the creditor cannot subsequently pursue any remedy depending on such relation. He is not entitled therefore to an order against the executor for

(u) See *post*, Pt. v. Bk. II. Ch. II.

(v) *Gaunt v. Taylor*, 2 Hare, 413.

(x) 5 Meriv. 481, note.

(y) Jacob, 124.

(z) 3 Swanst. 542, 543, 547, 548. See also *Terrewest v. Featherby*, 2 Mer. 480.

payment into Court or a subsequent attachment under the Debtors Act, 1869, s. 4 (a).

In the case of *Etheridge v. Wormsley* (b), a creditor had previously to any administration decree, obtained judgment in a County Court against the defendant, a sole executrix. Pearson, J., refused to restrain the creditor from pursuing his remedy in the County Court against the executrix personally, but ordered payment to the creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment.

One executor or administrator can in equity bring an action against another (c).

Right of
executor or
administrator
to sue before
probate or
letters of ad-
ministration.

An executor or administrator (d) can in equity as at law sue before grant to him of probate, or letters of administration, but he must obtain a grant of probate or letters of administration before the hearing (e). In the same way an executor of a creditor of a company can present a winding-up petition before obtaining probate. And it would seem to be unnecessary for an executor to allege in his pleading that a valid grant of probate has been made to him (f).

Evidence of
death of
testator.

In an old case (g), it was held that production by a plaintiff, suing as administrator to A., of the letters of administration, was not *primâ facie* evidence of A.'s death (h), but at the hearing, liberty was given to the plaintiff to exhibit interrogatories to prove the death, and the cause permitted to stand over for that purpose (i).

Right of
executor or

An action commenced by the dead man can be continued by

(a) *Re Thomas*, [1912] 2 Ch. 348.

(b) 29 Ch. D. 557.

(c) *Allen v. Story*, Toth. 150; *Peake v. Ledger*, 8 Hare, 313. See the American case of *Beall v. Hilliary*, 1 Maryland, 186; 54 American Decisions, 649.

(d) *Humphreys v. Humphreys*, 3 P. Wms. 350.

(e) See *ante*, p. 218.

(f) *Re Masonic and General Life Assurance Co.*, 32 Ch. D. 373, *ante*, p. 219. The old practice was to allege that probate had been granted or letters of administration taken out: *Humphreys v. Ingledon*, 1 P. Wms. 753, *ante*, p. 219.

(g) *Moons v. De Bernales*, 1 Russ. Chanc. Cas. 301.

(h) See *ante*, p. 448.

(i) See *Hood v. Pimm*, 4 Sim. 101. Where money was ordered to be paid to A. or his representatives, the mere production of the probate was not formerly sufficient to enable the representative to obtain payment; proof of the death was required, and that the testator was the party in the cause: *Clayton v. Gresham*, 10 Ves. 289. See S. C. F. R. 1915, rr. 62, 64, 65.

his executor or administrator, if the interest survives, on obtaining an order for that purpose (*k*).

An action commenced by co-executors does not abate by the death of one of them, as the whole of his interest survives to the others, nor is any order to continue the proceedings necessary (*l*).

Where there are several executors, they should all sue, though one of them is an infant (*m*). If only one of several executors has proved, he may sue alone without making the other executors parties, although they may not have renounced (*n*), unless they have acted (*o*). Where one of two or more executors refuses to join as a plaintiff, the other or others can still bring the action, making the executor who refuses to join a defendant (*p*).

Any executor, administrator or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate or the execution of the trusts (*q*).

An executor or administrator is not allowed to sue or defend as a pauper, "because the indulgence intended poor persons not of ability to sue for their rights *in formâ pauperis* only extends to persons suing in their own rights, and not as executor or administrator" (*r*).

The ordinary method of invoking the aid of the Chancery Division is by writ of summons; in some cases a special mode of procedure by originating summons, motion, or petition applies, but in all cases to which such special procedure does not apply, proceedings can only be commenced by writ. An originating summons is by far the most important form of special procedure. It is only in cases specially defined by statute or the Rules of Court that the Court can exercise jurisdiction on an application by originating summons (*s*).

(*k*) Ord. XVII.

(*l*) Toller, 497.

(*m*) 16 Vin. Abr. 251, tit. Parties (B.), pl. 20.

(*n*) *Davies v. Williams*, 1 Sim. 5; Dan. Ch. Pr. 8th edit. 171; and see *ante*, p. 718.

(*o*) *Vickers v. Bell*, 4 De G. J. & S. 274; and see *ante*, p. 1497.

(*p*) See Ord. XVI. r. 11; and cf. *Luke v. South Kensington Hotel*, 11 C. D. 121. See also Ord. LV. r. 5 (*h*).

(*q*) Ord. XVI. r. 38. See also Ord. XVI. rr. 8, 9, 32, 40, 46, and Ord. LV. r. 3.

(*r*) *Paradise v. Sheppard*, 1 Dick. 136; *Oldfield v. Cobbett*, 1 Phil. Ch. C. 613; *Fowler v. Davies*, 16 Sim. 182. See R. S. C. (Poor Persons), 1914, Ord. XVI. r. 22.

(*s*) For other methods for obtaining the advice and direction of the Court, see *post*, p. 1542.

administrator to continue an action.
Effect of death of one of several plaintiff co-executors.

Parties to an action by executors.

Executor cannot sue or defend in *formâ pauperis*.

Writ or originating summons.

Difference between proceedings commenced by writ and originating summons.

The chief difference between proceedings commenced by writ and originating summons is, that the proceedings in the former case are in Court, and there are usually pleadings delivered by the parties; in the latter case the proceedings are in chambers, without pleadings.

Costs of proceedings wrongly commenced.

In all cases where proceedings can be commenced by originating summons they can also be commenced by writ of summons; but if proceedings are commenced by writ of summons, which ought to be commenced by originating summons, the extra costs incurred are usually thrown upon the plaintiff (*t*).

Why a summons is preferable in case of doubt.

If there be any real doubt as to whether proceedings should be commenced by originating summons or by writ, the preference should be given to originating summons, as, should the procedure ultimately turn out to be wrong, the Court will usually give the executor or administrator issuing the summons his costs out of the estate, where a mistake has *bonâ fide* been made. Where an originating summons had, in the first instance, been taken out and dismissed on the ground of want of jurisdiction, North, J., on a subsequent application by petition to deal with the same fund, allowed the costs of the summons, because it had been issued in the reasonable expectation that the order could be made in chambers, and it was a meritorious application (*u*).

Matters of special difficulty.

The difficulty or importance of the question involved is no reason for refusing to deal with it on originating summons, but in matters of special difficulty, or where questions of large amount are involved, the Court usually looks with indulgence on proceedings commenced by writ (*x*).

Heading of writ, &c., in an administration action.

In an administration action the writ and pleadings must be entitled, "In the matter of the estate of A. B., deceased, Between," &c. An originating summons for the determina-

(*t*) In many cases the costs of proceeding by writ are actually less than the costs of proceeding by summons would have been. As many orders can only be made by the Judge personally (see Ord. LV. rr. 15 and 15A), and as most important matters are adjourned to him, both time and expense can often be saved by proceeding by writ, and the Judge can, and will, upon application by motion, and with the consent of the parties, at once make the order required.

(*u*) *Re Jellard's Trusts*, W. N. (1888), p. 42. The Judge usually allows the costs where there is room for doubt as to the jurisdiction on summons, and a mistake has been made *bonâ fide*.

(*x*) See *Bond v. Walford*, 54 L. T. 672.

tion of a question arising in the administration of an estate must be entitled in the same way (*y*). Or administration summons.

The Court can make an order for general administration of the personal and real estate of a deceased person on originating summons (*z*).

The rules giving special remedies to executors and administrators by originating summons are rules 3, 4 and 4a of Ord. LV. of the Rules of the Supreme Court.

Rule 3 of Ord. LV. is as follows: "The executors or administrators of a deceased person, or any of them, and any person claiming to be interested in the relief sought as a creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case require, (that is to say) the determination, without an administration of the estate or trust, of any of the following questions or matters:—

- "(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*;
- "(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- "(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;
- "(d) The payment into Court of any money in the hands of the executors or administrators or trustees (*a*);
- "(e) Directing the executors or administrators or trustees to do, or abstain from doing, any particular act in

Questions which can be determined on originating summons.

(*y*) See Table of Titles of originating summonses and petitions issued out of the Central Office, and R. S. C. Aug. 1894, Ord. LIV. r. 46, and App. K. Form 1A.

(*z*) R. S. C. 1883, Ord. LV. r. 4, *post*, p. 1526. An order cannot be made to serve an originating summons out of the jurisdiction: *Re Busfield*, 32 C. D. 123; *Re Campbell*, [1920] 1 Ch. 35.

(*a*) It appears that only money actually in the hands of executors, administrators, or trustees will be ordered to be paid into Court under this rule. See *post*, p. 1598.

their character as such executors or administrators or trustees (c);

“(f) The approval of any sale, purchase, compromise, or other transaction (d);

“(g) The determination of any question arising in the administration of the estate or trust (e).”

Adminis-
tration on
originating
summons.

Under rule 4 of Ord. LV. “Any of the persons named in the last preceding rule may, in like manner, apply for and obtain an order for—

“(a) The administration of the personal estate of the deceased:

“(b) The administration of the real estate of the deceased:

“(c) The administration of the trust.”

Under rule 4a of Ord. LV. (R. S. C. Oct. 1889), “If for the purposes of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or any devisee or legatee of the person who has died, having real estate vested in him within the meaning of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act may be given on any originating summons taken out under rules 3 and 4 of this Order.”

Under rule 5 of Ord. LV. “The persons to be served with the summons under the last two preceding rules (f) in the first instance shall be the following; (that is to say)—

“A. Where the summons is taken out by an executor or administrator or trustee;

“(a) For the determination of any question, under subsections (a) (e) (f) or (g) of rule 3, the persons, or one

(c) The act must be something within their trust: *Suffolk v. Lawrence*, 32 W. R. 899.

(d) The Court cannot order a sale under this rule. It can only approve one as to which the trustees have a discretion. The Court has, however, power to order a sale where necessary or expedient for the purposes of the action before it, under Ord. LI. r. 1: *Re Robinson*, 31 C. D. 247. See on this rule *Re Household*, 27 C. D. 553, where trustees were authorized to advance to the tenant for life part of the personal estate for the purpose of stocking and cultivating a farm forming part of the settled real estate.

(e) Under this rule only those questions can be determined which before the existence of the rule could have been determined under a judgment for the administration of an estate or the execution of a trust: *Re William Davies*, 38 C. D. 210. This subject will be found further treated of in the subsequent chapter dealing with the remedies against executors and administrators in equity.

(f) Rr. 3 and 4 of Ord. LV.

of the persons, whose rights or interests are sought to be affected:

“(b) For the determination of any question, under sub-section (b) of rule 3, any member, or alleged member of the class:

“(c) For the determination of any question, under sub-section (c) of rule 3, any person interested in taking such accounts:

“(d) For the determination of any question, under sub-section (d) of rule 3, any person interested in such money:

“(e) For relief under sub-section (a) of rule 4, the residuary legatees, or next of kin, or some of them:

“(f) For relief under sub-section (b) of rule 4, the residuary devisees, or heirs, or some of them:

“(g) For relief under sub-section (c) of rule 4, the *cestuis que trust* or some of them:

“(h) If there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur:

“B. Where the summons is taken out by any person other than the executors, administrators or trustees, the said executors, administrators or trustees.”

Ord. XVI. contains the following rules relating to procedure in administration proceedings:—

Rule 8. “Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previous existing parties (g).”

Trustees, executors, &c. may sue and be sued as representing estate.

9.—(a). “Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties in the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable

Power to approve compromise in absence of some of the persons interested.

expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts (*h*).

Power to
appoint per-
son to repre-
sent heir,
next of kin,
class, to
determine
question of
construction:

32.—(a). “In any case in which the right of an heir-at-law, customary heir, or the next of kin or a class, shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law, customary heir, or next of kin or class, and the Court or Judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, customary heir, next of kin, or class, shall have been ascertained by means of enquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, customary heir, next of kin, or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, customary heir, next of kin or class so represented.

Power to
appoint per-
son to repre-
sent heir,
next of kin,
class, in
other cases.

(b). “In any other case in which an heir-at-law, or customary heir, or any next of kin or a class shall be interested in any proceedings, the Court or Judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next of kin or class, and the judgment or order of the Court or Judge in the presence of the persons so appointed shall be binding upon the persons so represented (*i*).

Any re-
siduary
legatee or
next of kin
may obtain
order for
administra-
tion without
serving other
beneficiaries:
So legatee
interested in
proceeds of
realty:

33. “Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person, may have the same without serving the remaining residuary legatees or next of kin.

34. “Any legatee interested in a legacy charged on real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

(*h*) See Ord. XVI. r. 9, *post*, p. 1635, as to one or more persons suing and being sued on behalf of all persons having the same interest.

(*i*) See also *post*, p. 1635.

35. "Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

So residuary devisee or heir:

38. "Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

So executor, administrator, or trustee may obtain order for administration against any one beneficiary.

39. "The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Judge may require any person to be made a party and may give conduct of action to any person.

40. "Wherever, in any action for the administration of the estate of a deceased person or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made—

Notice of judgment to be served on certain persons:

"(a) Under Order XV.;

"(b) Under Order XXXIII.;

"(c) Affecting the rights or interests of persons not parties to the action;

the Court or Judge may direct that any persons interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order; and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or Judge to discharge, vary, or add to the judgment or order.

effect of service.

41. "It shall not be necessary for any person served with notice of any judgment or order to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance.

Order for liberty to attend not necessary;

appearance to be entered.

46. "If in any cause or matter, or other proceeding, it shall appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence

Where no legal personal representative, Court may proceed in

the absence,
or appoint
some person
to represent
the estate.

of any person representing the estate of the deceased person, and may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons (if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding (j).

Appearance
at chambers
in respect of
creditor's
claims.

47. "In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The Court or a Judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit" (k).

Under rule 6 of Ord. LV., "The Court or a Judge may direct such other persons to be served with the summons as they or he may think fit."

Application
in chambers
as to parties
to be served.

In a case where it was necessary to determine on the construction of a Will whether the members of a class took *per capita* or *per stirpes*, but where, as the members of the class were known, the Court could not appoint the persons before it to represent the class under Ord. XVI. r. 32, it was held that the proper course to adopt was to serve the executors first, and then apply in chambers, to have it ascertained who were the parties interested, and who ought to be served (l).

Advantage to
an executor
of having
questions
decided by
the Court.

The above rules give an executor or administrator a cheap and speedy method of getting the assistance and directions of the Court, and he is of course protected where he acts under an order so obtained. In all cases to which the rules apply, the executor or administrator, where there is any doubt or difficulty, should issue an originating summons and have the matter decided by the Court, and not rely on the advice of a solicitor or opinion of counsel, which, according to the circumstances,

(j) As to r. 46, see *post*, Pt. v. Bk. II. Ch. II.

(k) *Re Schwabacher*, [1907] 1 Ch. 719.

(l) *Re Gardiner*, W. N. (1887), p. 59.

may, or may not, afford him some indemnity. The tendency of the Court seems rather to encourage than to discourage applications by executors or administrators under this rule (*m*). They are entitled to the fullest possible protection which the Court can give them, and on applying to the Court under advice though it may appear to be unsound, they will not be readily treated as not acting with propriety and be deprived of costs (*n*).

An application should, for instance, always be made to the Court for its directions under these rules where there is difficulty in construing the Will; as an executor or administrator who, although acting *bonâ fide*, distributes the estate on what turns out to be an erroneous construction, is liable to make good the funds he has parted with (*o*), and he is also liable to be charged with interest on the money he has to make good (*p*); but in a case where the legatee, to whom the money has to be made good, had full knowledge of the erroneous payment and acquiesced in the erroneous view of the Will, the Court did not make the executor pay interest (*q*).

The Court has the same jurisdiction as to costs on a summons properly taken out under Ord. LV. as in an ordinary administration action, and it can on such a summons, if the proper parties are before it, deal with the question of costs, although no estate or fund be sought to be administered (*r*).

The practice as to administration actions was changed by the Rules of the Supreme Court, 1883. "There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit. There were no means, according to the old practice, of bringing isolated questions under a Will before the Court for its determination except by an administration suit. It was felt that that very

Questions of construction of Wills.

The Court has the same jurisdiction as to costs as in an action commenced by writ.

New practice in administration actions.

(*m*) See, for example, the remarks of Stirling, J., in *Re Partington*, 57 L. T. 660.

(*n*) *Re Buckton*, [1907] 2 Ch. 406, 414.

(*o*) *Saltmarsh v. Barrett*, 31 Beav. 349.

(*p*) *Att.-Gen. v. Köhler*, 9 H. L. C. 654. As to the rate of interest with which he is liable to be charged, see *ante*, p. 1472.

(*q*) *Re Hulkes*, 33 C. D. 552.

(*r*) *Re Medland*, 41 C. D. 476.

often involved parties in an amount of expense which was unnecessary, and which they ought to be relieved from" (s).

Partial administration.

In order to avoid this expense, power is expressly given to the Court by the rules of 1883 to determine any question without making a judgment or order for the administration of a trust or of the estate of a deceased person, if the question between the parties can be properly determined without such judgment or order (t).

This power is not confined to the cases which can under Ord. LV. rr. 3 and 4, be raised by originating summons, but under Ord. LV. r. 10, the Court has this power, whether the question arise on summons "or otherwise."

This power extends to administration actions commenced before, but tried after, the rule came into operation (u).

Question as to whether general administration is necessary can be referred to chambers. Grounds on which the Court still makes a decree for general administration.

The question, whether in any particular case it is necessary that a general administration of the estate should be directed, can be referred by the Judge to be decided in chambers (v).

One ground on which the Court has since the rules of 1883 directed a general administration is, that without it the executors or administrators cannot be adequately protected. For instance, where a testator had up to his death been engaged in the businesses of a merchant, shipbroker, insurance broker, and farmer, and was also the managing owner of six steamers, the proprietor of a colliery, and a partner in two other collieries—in addition, he was the sole defendant in a partnership action relating to one of the collieries, in which heavy claims were made against him by the partners—under these circumstances, questions arose whether any and which of his businesses ought to be carried on, and what ought to be done by his executors as to the defence of the pending action, and how and when his property ought to be realised. On these facts, Chitty, J., directed a general administration, and in addition directed special enquiries with regard to the testator's businesses and shares in ships (x).

Binding creditors.

It appears that no order short of a general administration order will bind creditors (y).

(s) Pearson, J., in *Re Wilson*, 28 C. D. 457, 460. And see observations of Farwell, J., in *Re Skinner*, [1904] 1 Ch. 289, 293.

(t) R. S. C., Ord. LV. r. 10.

(u) *Re Llewellyn*, 25 C. D. 66.

(v) *Ibid.*

(x) *Re Dickinson*, W. N. (1884), p. 199.

(y) See *Re Mills*, W. N. (1884), p. 21, where Pearson, J., appears

In considering whether an order for general administration should or should not be made the Court will be governed by the circumstances of each case (*z*); the smallness of the assets is a material circumstance to decide the Court against making such an order (*a*).

Smallness
of assets.

The fact that the testator has by his Will directed his trustees to commence an action for administration does not deprive the Court of its discretion to refuse to make an order for general administration; but the Court gives weight to such a direction in considering whether the order should, or should not, be made (*b*).

A direction
in a Will to
obtain
general
administra-
tion does not
deprive the
Court of its
discretion.

No order for general administration can be made except by the Judge in person (*c*).

Order for
general ad-
ministration
must be made
by judge.
Order for
administra-
tion with a
proviso
limiting
proceedings
under it.

Where an executor or administrator either has proceedings commenced against him in respect of debts due from his testator or intestate, or is threatened with such proceedings, it is often very important that an order for general administration of the estate should be obtained, so as to protect it for the general body of creditors, or to give time to realise it properly. Where such a course is necessary there is power for the Court or a Judge to make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order, or under any particular account or inquiry directed, without leave of the Judge in person. Such an order can only be made where the application for administration is by a creditor or beneficiary, and where no accounts or insufficient accounts have been rendered, not where the application is by the executor or administrator (*d*).

to have adopted such a view; and *Re Barrett*, 43 C. D. 70, where North, J., held that an order for an account under Ord. XV. r. 1, did not put an end to the executor's right to prefer a particular creditor. Orders for limited administration are often productive of expense only, as after a limited order has been made, an order for general administration is frequently found to be necessary. Where it is likely that ultimately an order for general administration will be required, the better way is for the order to be made at once, with a direction that no proceedings are to be taken under it without the leave of the Judge in person. See Ord. LV. r. 10a (b).

(*z*) See hereon *Re Wilson*, 28 C. D. 457, and *Re Gyhon*, 29 C. D. 834.

(*a*) *Re Jennings*, 28 Sol. Jo. 477.

(*b*) *Re Stocken*, 38 C. D. 319.

(*c*) R. S. C., Ord. LV. r. 15a.

(*d*) R. S. C., Ord. LV. r. 10a (b).

Order to
deliver
accounts.

In the same way, upon an application for administration or execution of trusts by a creditor or a beneficiary where no accounts or insufficient accounts have been rendered, the Court or Judge may order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*e*).

An absolute order for sale made in an administration suit operates as a conversion from the date of the order (*f*).

Costs.

Under R. S. C. 1883, Ord. LXV. r. 1 (*g*), subject to the provisions of the Acts and Rules, the costs of and incident to all proceedings in the Superior Court including the administration of estates and trusts are in the discretion of the Court or Judge. This general rule applies to all cases in which executors, administrators, or trustees, are instituting suits against strangers to their trust on behalf of their trust estate; and they are, when plaintiffs, subject to the same rules, and personally liable to pay costs, as if they were suing in their own right (*h*). But nothing in the rule is to deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules previously acted on in the Chancery Division (*i*).

General rule
as to an exe-
cutor's costs.

An executor or administrator fairly instituting an action for the direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for the protection of the executor or administrator, will also have his costs out of the fund (*k*).

The question of an executor's or administrator's costs will be found dealt with in a subsequent chapter.

Charges and
expenses
should not be
included in
the "bill of
costs."

It is a common mistake for executors and administrators in taking in their costs for taxation to include in them items of charges and expenses; this is wrong, as the charges and ex-

(*e*) Ord. LV. r. 10a (a). See as to the application of this rule, *Re Fish*, [1893] 2 Ch. at p. 427.

(*f*) *Hyett v. Meekin*, 25 C. D. 735; *ante*, p. 505.

(*g*) See *ante*, p. 1515.

(*h*) Dan. Ch. Pr. 8th edit. p. 1028. Their right to reimbursement out of the estate will be found dealt with *ante*, pp. 763, 764.

(*i*) Ord. LXV. r. 1.

(*k*) Dan. Ch. Pr. 8th edit. p. 1056.

penses should be included in their accounts, and allowed for when the accounts are taken.

Executors and administrators are not entitled to their charges and expenses on taxation without an express direction that they are to be included in the taxation, as the executor or administrator is presumed to retain them out of the estate (*l*).

The ordinary practice now is to allow executors or administrators their costs of action (out of their estate) as between solicitor and client, together with any charges and expenses, properly incurred relating to the trust, beyond costs of action, on the suggestion of counsel, of some particular expenses incurred, and the case must be supported before the taxing master; it is not the practice in taking the account in chambers to allow the charges and expenses incurred since the suit, but they are provided for on further consideration (*m*).

Practice in allowing charges and expenses.

The charges and expenses of an executor or administrator do not include funeral and probate expenses (*n*), nor the costs of other actions unless specially provided for (*o*).

In taking any account directed by any judgment or order, all "just allowances" are made without any direction for that purpose (*p*).

"Just allowances."

The question what are just allowances is usually left to be decided on the taking of the account (*q*).

What are just allowances depends very much upon the circumstances of each case: it is, however, the settled rule, that whatever a trustee or personal representative has expended, in the fair execution of his trust, may be allowed him in passing his accounts (*r*).

Under the head of "just allowances" money which has been reasonably expended in taking opinions and procuring directions (*s*), payments by executors in discharge of legacies (*t*), deductions for dower out of rents received by a

Instances of allowances under this head.

(*l*) *Humphreys v. Moore*, 2 Atk. 108.

(*m*) Seton, 7th edit., 1127.

(*n*) *Collis v. Robins*, 1 De G. & S. 131.

(*o*) *Payne v. Little*, 27 Beav. 83.

(*p*) Ord. XXXIII. r. 8.

(*q*) *Brown v. De Tastet*, Jac. 284, 294.

(*r*) Dan. Ch. Pr., 8th edit., p. 1085. For instance, in the case of *Re Bird*, L. R. 16 Eq. 203, an executor was allowed money which he had paid to his solicitor on a misrepresentation by the solicitor, and which the latter had misappropriated.

(*s*) *Fearn v. Young*, 10 Ves. 184.

(*t*) *Nightingale v. Lawson*, 1 Cox, 23.

widow trustee (*u*), expenses of managing and carrying on a partnership business (*x*), and a mortgagee's expenses of seizing and holding possession of a ship, advertising it for sale, and effecting insurances upon it (*y*), have been allowed.

Improper
employment
of a solicitor.

An executor or administrator will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself (*z*).

Duty of the
executor or
administrator
with regard
to the busi-
ness of the
deceased.

When a trader dies, obviously his trade or business descends to his executors or administrators as part of his assets.

It is equally obvious that his trade or business must be either wound up or realized by his executors or administrators or be carried on by them.

The carrying on of the trade or business, too, may be either merely for the purpose of realization or it may be continued for the purpose of making a profit.

In carrying on the trade or business of the deceased for either of the above purposes, the following persons may be affected by the success or failure of the trading:—

- (a) Creditors of the deceased.
- (b) Beneficiaries under the Will.
- (c) Creditors whose debts are incurred in the trading subsequently to the death of the deceased.

To carry it on
until it can be
realized.

Both an executor and an administrator are entitled, where the business of the deceased is a valuable asset, to carry it on for such reasonable time as may be necessary to enable them to sell it as a going concern, and also to an indemnity, even as against creditors, in respect of the liabilities properly incurred in so doing (*a*); but the executor or administrator who carries on the business of his testator makes himself personally liable for all debts so contracted, and it makes no difference that he avowedly acts as executor or administrator (*b*).

Liability of
an executor
carrying on
the business
of the
deceased.
Business
carried on
not merely

Even where the business is not carried on merely for the purpose of realization, but under a power in the testator's Will,

(*u*) *Graham v. Graham*, 1 Ves. Sen. 268.

(*x*) *Brown v. De Tastet*, Jac. 284, 299; *Cook v. Collingridge*, Jac. 607, 621.

(*y*) *Wilkes v. Saunton*, 7 C. D. 188.

(*z*) *Harbin v. Darby*, 28 Beav. 325; and see *ante*, p. 1488.

(*a*) See *per* Lord Herschell in *Dowse v. Gorton*, [1891] A. C. 190, at p. 199.

(*b*) *Labouchere v. Tupper*, 11 Moo. P. C. 198. This subject will be found more fully treated of in an earlier chapter, see *ante*, p. 1412 *et seq.*; see also *post*, p. 1616 *et seq.*

the executor is entitled to be indemnified by the estate against all liabilities properly incurred by him in so doing, not only as against beneficiaries, but also as against creditors, if they have assented to its being carried on, and if it has been carried on properly and *bonâ fide* in the interests both of beneficiaries and creditors (*c*); and the same principle applies, where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, even where the Will does not contain a power to carry on the business (*d*).

for the purpose of realization under a power.

An administrator is only entitled to carry on the business of the intestate for the purpose of realization, and if he does any more than this he renders himself personally liable for the debts so incurred without any right of indemnity out of the intestate's estate (*e*). Any assets acquired in such trading belong to the intestate's estate, subject to the right of the administrator to be indemnified for what he has expended in obtaining such assets, if he is not a debtor to the estate; and a judgment creditor for the price of the assets stands, as against the estate, in no higher position than the administrator (*f*).

An administrator is only justified in carrying on the business for the purpose of realizing it.

An executor who is not expressly or impliedly authorized (*g*) by the Will of his testator to employ the whole or some part of the estate in carrying on the business is in the same position as an administrator (*h*).

An executor is on the same footing unless authorized to carry on.

Where there is no power in the Will to carry on the business and it is carried on for the benefit of the widow and not under an agreement with the testator's creditors, the executors are not entitled to an indemnity. Merely standing by with knowledge that the business is being carried on does not constitute assent by the creditors so as to entitle the executors to be indemnified (*i*).

(*c*) *Dowse v. Gorton*, [1891] A. C. 190. As to what constitutes such assent, see *Re Oxley*, [1914] 1 Ch. 604, *infra*. The mere assent of the creditors is not sufficient to constitute the executor their agent: *Re Millard*, 72 L. T. 823.

(*d*) *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600.

(*e*) *Re Evans*, 34 C. D. 597. See also *Strickland v. Symons*, 22 C. D. 666; 26 C. D. 245.

(*f*) *Re Evans, supra*.

(*g*) As to what amounts to such an authority, see *ante*, p. 1414, note (*t*).

(*h*) A direction to carry on the testator's business authorizes the employment in it of the capital left in the business by the testator at his death: *M'Neillie v. Acton*, 4 D. M. & G. 744.

(*i*) *Re Oxley*, [1914] 1 Ch. 604.

The executor's right to be indemnified out of the assets.

As against both beneficiaries and creditors.

Where, however, the executor is authorized by the Will to carry on the business of his testator, and to apply the whole or some portion of the estate to that purpose, although he is personally liable for the debts he incurs in carrying on the business, he has the right to be indemnified out of the specific assets which he is authorized to employ in the business (*j*). If, however, the executor is in default to the specific trust estate devoted to the business, the rule does not apply, nor can the creditors get their debts paid out of the specific assets, until the default is made good (*k*). He does not, however, lose his right of indemnity merely by reason of his failure to account, nor do the creditors lose their right of claiming through that indemnity against the estate (*l*).

An executor who carries on the business of his testator can sue as executor for debts incurred to the estate in carrying on the trade since the testator's death (*m*).

The subject of the rights and liabilities of an executor or administrator carrying on the business of the deceased will be found further dealt with in a subsequent chapter (*n*).

Trustee Act, 1893 (56 & 57 Vict. c. 53).

The Trustee Relief Acts, 1847—1849, and sect. 32 of the Legacy Duty Act, 1796 (*o*), which provides facilities for executors in the discharge of their duties and relief from some of the responsibilities incident to their office, have now been superseded by the Trustee Act, 1893. As to proceedings under this Act, see Order LIVB., R. S. C. (Trustee Act), 1893.

By sect. 50 of this Act the expressions "trust" and "trustee" are defined as including the duties incident to the office of personal representative of a deceased person. Sect. 42 of the Act provides as follows:—

Trustees may pay trust moneys or transfer stocks and securities into the High Court:

"(1.) Trustees or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the High Court.

(*j*) *Ex parte Garland*, 10 Ves. 120; and cf. *Strickland v. Symons*, *ubi supra*. An administration order can be obtained by a creditor whose debt was incurred by executors in carrying on business under an authority in the Will, although the testator himself had incurred no debts which remained unpaid: *Re Shorey*, 79 L. T. 349.

(*k*) *Re Johnson, Shearman v. Robinson*, 15 C. D. 548.

(*l*) *Re Kidd*, 70 L. T. 648.

(*m*) *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(*n*) *Post*, p. 1616.

(*o*) 36 Geo. III. c. 52.

“(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court.

“(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depository, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid or delivered.”

As to lodgment under this section, see Ord. LIVB. r. 4. If the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which legacy duty has been paid or is not chargeable, the lodgment may be made (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force. By r. 41 of the Supreme Court Funds Rules, 1915, provision is made with regard to lodgment by a legal personal representative without an affidavit.

Funds not exceeding 500*l.* in amount or value, held upon trusts within the meaning of the now repealed Trustee Relief Acts, could, under sect. 70 of the County Courts Act, 1888, be paid by the trustees into a Post Office Savings Bank, established in the town where the Court of the district in which any of the trustees or other persons reside is held, in the name of the Registrar of the Court, in trust to attend the orders of the Court, and the payment out could be ordered by the County Court. Presumably this provision is now to be read with the substitution of the Trustee Act, 1893, for the Trustee Relief Acts, but the Trustee Act, 1893, contains no provisions expressly relating to the jurisdiction of the County Courts, the only mention of which in the Act occurs in sect. 46. It would seem, however, by reference to the provisions of the Interpreta-

also into Post
Office
Savings
Bank under
sect. 70 of
the County
Courts Act,
1888.

tion Act, 1889, that the County Courts have still jurisdiction as regards sums not exceeding 500*l.* in all cases where it previously existed.

Charity
money
should
be paid to
Official
Trustee of
Charitable
Trusts.

Trustees who hold money belonging to a charity can pay the money to the Official Trustee of Charitable Trusts, and should not pay it into Court, although strictly speaking they have a right to do so if they choose (*p*).

Funds in Court belonging to the estate of a deceased person will not be paid out to his personal representatives after ten years from his death without notice to the beneficiaries (*q*). Nor will funds in Court directed to be paid to a person named in an order be paid to his personal representative unless probate or letters of administration have been granted within six years from the date of the order (*r*).

Money paid into Court under sect. 42 of the Trustee Act, 1893, was ordered by North, J., to be paid out without a petition (*s*). And in *In re Hood's Trusts* (*t*), the same judge ordered payment out to the executor of funds paid in by the administrator of a supposed intestate before the discovery of a Will, on the executor's petition.

Under R. S. C. (Trustee Act), 1893, Ord. LIV. r. 5, applications under the Trustee Act relating to funds paid into Court may be made by summons in any case coming within the provisions of Ord. LV. r. 2. The latter rule includes the following (amongst others) applications:—

“(1.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or of the birth, marriage, or death of any person:

“(2.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed 1,000*l.* or the securities do not exceed 1,000*l.* nominal value:”

As a general rule, the costs of paying a fund into Court by the executor or administrator ought to be paid out of the

Costs of
paying the
fund into
and out of
Court.

(*p*) *Re Poplar School*, 8 C. D. 543.

(*q*) Practice Note, [1904] W. N. 135.

(*r*) S. C. F. R. 1915, rr. 62, 65.

(*s*) *Pullen v. Isaacs*, W. N. (1895) 90.

(*t*) [1896] 1 Ch. 270.

general estate (*u*), but if the fund has already been completely severed from the general estate, and appropriated, the costs of payment in ought to come out of the fund itself (*x*). The costs of paying the fund out of Court generally fall upon the fund itself (*y*), but the Court can, on a proper application, order them to be paid by the general estate, where such general estate remains in the hands of the executor (*z*).

The trustee paying money into Court is *primâ facie* entitled to his costs of payment in and of his appearance on the petition or summons for payment out, but the Court has a discretion to deprive him of costs if he pays money in vexatiously (*a*), but not when he acts under a mere misapprehension (*b*). Upon the application for payment out, the jurisdiction of the Court is limited to the fund which has actually been brought into Court; and it cannot order repayment by the trustees of costs and expenses deducted by them on the payment in; if it can be shown that the costs and expenses have been improperly retained, separate proceedings must be taken against the trustees to recover the amount (*c*).

Trustee's costs of payment into and out of Court.

The occasions on which trustees should pay funds in their hands into Court have been considerably lessened by the rules of the Supreme Court. Under Ord. LV. r. 3, trustees can now obtain the directions of the Court cheaply and quickly, in many cases in which formerly they would have been properly advised to pay their funds into Court. For instance, trustees who are desirous of ascertaining who are the persons entitled to a fund, or of having the question who are entitled to the fund determined by the Court, should not pay the fund into Court under the Trustee Act, 1893, but should take out a summons under Ord. LV. r. 3 (*d*), to have such persons ascertained by the Court (*e*). Trustees should also remember that the payment of funds into Court, and the subsequent application for payment out of Court, are expensive processes which ought

Trustees should not pay funds into Court unnecessarily.

(*u*) *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679.

(*x*) *Re Lorimer*, 12 Beav. 521.

(*y*) *Re Dickson*, 1 Sim. 37; *Re Ross*, *ibid.*; *Re Jones*, *supra*; *Re Robertson*, 6 W. R. 405; *Re Wilson*, 14 W. R. 161.

(*z*) *Re Trick*, L. R. 5 Ch. 170; *Re Birkett*, 9 C. D. 576; and *Re Gibbons' Will*, 36 C. D. 486.

(*a*) See Morgan's Chancery Acts, 6th edit. 54.

(*b*) *Re Jenkins*, 3 N. R. 408.

(*c*) *Re Parker's Will*, 39 C. D. 303.

(*d*) See *ante*, p. 1525.

(*e*) *Re Giles*, 55 L. J. Ch. 695.

to be avoided, in the interests of their *cestui que trust*, where any other reasonable and safe course is open to them (*g*).

Executors and administrators are entitled, after taking reasonable means for ascertaining the debts owing by the dead man (and, in the case of administrators, the persons properly claiming as next of kin), to distribute the balance of the estate amongst the beneficiaries and next of kin respectively.

22 & 23 Vict.
c. 35, s. 29.
Executors,
&c. may dis-
tribute assets
after due
notice to
creditors and
others to
send in
claims.

By Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29, it is provided that where an executor or administrator shall have given proper notices (*h*) for creditors and others to send in their claims, he may at the expiration of the time named in the notices distribute the assets amongst the parties entitled, having regard to the claims of which he has then notice, and is not liable for assets so distributed to any person of whose claim he has not had notice; but the right of any creditor or claimant to follow the assets is not prejudiced by the section (*i*).

The section applies to claims of next of kin as well as creditors (*k*). But it does not, of course, protect executors against claims of which they have notice (*l*). It protects them whether they have paid over the legacies or only appropriated them, the legacies in the latter case being no longer in their hands *quâ* executors (*m*).

Methods of
obtaining the
advice and
direction of
the Court.

There are several ways in which the opinion and directions of the Court can be obtained where the parties interested are agreed as to the point which they wish to be decided, without going to the expense of an action protracted through all its stages.

Trustee,
executor, &c.
may apply
by petition
to judge of
Chancery for

Section 30 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), provided that trustees, executors, or administrators might apply by petition for the advice or opinion of the judge in matters respecting the administration of trust property or the assets of a

(*g*) Cf. *Re Gibbons' Will*, 36 C. D. 486.

(*h*) As to advertisements, see Ord. LV. r. 44. See also *Wood v. Weightman*, L. R. 13 Eq. 434, and Dan. Ch. Pr. 7th edit. 825. There is no rule of practice that in every case the advertisement must be inserted in the "Times" or some other London daily newspaper, in addition to the "London Gazette": *Re Bracken*, 43 C. D. 1.

(*i*) Sect. 27 of this Act enables executors and administrators to distribute the dead man's estate after providing for liabilities on leaseholds held by him.

(*k*) *Newton v. Sherry*, 1 C. P. D. 246.

(*l*) *Re Land Credit of Ireland*, W. N. (1872), p. 210; *Wood v. Wood*, 21 W. R. 135.

(*m*) *Clegg v. Rowland*, L. R. 3 Eq. 368; *Hunter v. Young*, 4 Ex. D. 256.

testator or intestate, but this section was repealed by the Trustee Act, 1893.

The following methods are, however, still open for the adoption of executors or administrators:—

1. Application by originating summons under Ord. LV. r. 3. The cases in which the opinion and directions of the Court can be obtained on originating summons will be found dealt with in an earlier part of this chapter (*n*). This method may be said to be now almost universally adopted, to the exclusion of those mentioned below, which, though still open to adoption, are in practice seldom used by executors or administrators for the above-mentioned purpose.

2. Special case. A special method of obtaining the opinion of the Court by means of a special case was provided by the Act 13 & 14 Vict. c. 35 (*o*). This statute was repealed by 46 & 47 Vict. c. 49, but its provisions are kept alive by Ord. XXXIV. r. 8, which provides: "Any special case may hereafter be stated, for the same purposes and in the same manner as was provided by the Act 13 & 14 Vict. c. 35, and the same shall be deemed to be a special case stated in a matter within the meaning of the order" (*p*). It is presumed, however, that the rule cannot have the effect of reviving the procedure under the Act.

3. Action. Under the new practice of the rules of the Supreme Court the institution of an action is not a very expensive procedure, and where the facts can be agreed on between the parties they can be stated in the plaintiff's statement of claim. and the action brought on for hearing on the facts so stated. In an action so instituted, the Court has full jurisdiction over the whole matter, and can make binding declarations of right, whether any consequential relief is or could be claimed or not (*q*).

4. The questions may be raised on issues of fact without pleadings (*r*). As this method presents no special advantage to executors or administrators, no further mention need here be made of it.

(*n*) *Ante*, p. 1525 *et seq.*

(*o*) See sects. 1 and 15.

(*p*) For the practice under the 13 & 14 Vict. c. 35, see Morgan's *Chancery Acts*, 6th edit. p. 403. And see also *Dan. Ch. Pr.* 8th edit. 1657.

(*q*) See Ord. XXV. r. 5.

(*r*) Ord. XXXIV. rr. 9—12.

opinion,
advice, &c.
in manage-
ment, &c.
of trust
property.

Salvage
cases.

The Court has sometimes, on the principle of salvage, authorized an expenditure out of capital, for the purpose of preventing loss or destruction to settled property, which ordinarily should be paid for out of income. In *Conway v. Fenton* (s), Kekewich, J., authorized trustees of a settlement to lay out 800l., part of settled personalty, in repairs and improvements on a farm forming part of the real estate comprised in the same settlement. This expenditure was authorized on evidence that the farm could not be let or sold, and that it would deteriorate unless the repairs were done, and that the tenants for life could not make the expenditure out of their income (t). The principle seems to have been carried to its fullest extent in the case of *Re Household* (u), where Bacon, V.-C., in exercise of such a jurisdiction, authorized the trustees of real and personal estate devised and bequeathed on trust for a father for life, with remainder to his children, to advance part of the money to the father (the tenant for life) for the purpose of stocking and cultivating a farm forming part of the real estate, the evidence showing that the farm could not be let at a remunerative rate, and, unless the advance was made, the farm would go out of cultivation and deteriorate in value (x).

Sale of
testator's
business to a
company.

In the case of *Re Crawshay* (y) an application was made to the Court to sanction the sale of large businesses, in which the testator was interested, to a limited company formed for the object of acquiring such businesses. The testator had given large legacies, some of which were settled, and the evidence showed that it was impossible to satisfy the testator's creditors and beneficiaries without a realization of the testator's partnership businesses and properties, and it was considered that such businesses and property if sold at once would, in consequence of trade depression, be sold at a serious sacrifice. The proposed scheme provided that the proposed company should pay for the businesses and property by means of debentures and fully paid-

(s) 40 C. D. 512.

(t) See also *Frith v. Cameron*, L. R. 12 Eq. 169; *Re Jackson*, 21 C. D. 786; *Glover v. Barlow*, 21 C. D. 788, note; *Re Household*, 27 C. D. 553.

(u) 27 C. D. 553.

(x) In *Re Lever*, [1897] 1 Ch. 32, the cost of sanitary works executed under the Public Health (London) Act, 1891, upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and remaindermen was held payable out of the capital of the residuary estate.

(y) 60 L. T. 357.

up shares in the company, which were to be appropriated to the persons entitled to the pecuniary legacies or their trustees. The Will contained a power to invest in "the stocks, funds, shares and debentures, mortgages or securities of any corporation or company." North, J., held that he had no jurisdiction to sanction the scheme, which he thought an alteration of the trusts of the Will, the investment clause only contemplating a going company, but he gave leave to apply to Parliament for a private Act authorizing the carrying out of the proposed scheme.

The ground on which North, J., held that the investment clause did not apply, namely, that the power contemplated a sale to a going company, not to a company merely formed to define and limit the liability of the persons already interested in the partnership business, seems a narrow one, and the same remark applies to another ground stated by his Lordship, that the power contemplated a sale, and by the scheme the parties would not sell but retain the property in specie, as wherever property is sold for shares in a company the seller to some extent retains an interest in the property sold. The cases in which the Court has exercised its original jurisdiction over settled property in order to prevent its loss or destruction do not appear to have been cited in *Re Crawshaw* (z), but the principle embodied in them would seem to apply to such a case.

The principles which were the subject of discussion in *Re Crawshaw* have been further considered in three recent cases—namely, *Re Morrison* (a), *Re New* (b), and *Re Tollemache* (c). Of these cases *Re New* and *Re Tollemache* went to the Court of Appeal, and the following observations of Romer, L. J., who delivered the judgment of the Court in *Re New* are important as showing the broad principles upon which the Court will proceed in deciding similar cases. "In the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trust*, that certain acts should be done by the

(z) 60 L. T. 357.

(b) [1901] 2 Ch. 534.

(a) [1901] 1 Ch. 701.

(c) [1903] 1 Ch. 457, 955.

trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency which has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. . . . Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character" (d). In this case the Court authorized the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realizable shares (fully paid) and debentures in the proposed new or reconstructed company.

The extreme limits of the jurisdiction of the Court to authorize trustees to go beyond the terms of a trust are laid down in *Re New* (e).

(d) [1901] 2 Ch. 544.

(e) *Re Tollemache*, [1903] 1 Ch. 955.

BOOK THE SECOND.

REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS.

IN the last place, it is proposed to treat of the Remedies against executors and administrators, by means of which their various duties and liabilities may be enforced in the King's Bench and Chancery Divisions of the High Court of Justice respectively.

Before entering on this subject, it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him (*a*). Therefore, if a foreign creditor wishes a suit to be brought here, in order to reach the effects of a deceased testator or intestate situate in England, it will be necessary, before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an English personal representative should also be duly constituted by grant from the Probate Court here; for the foreign executor or administrator is not liable to be sued, in his official character, in this country (*b*). But it must be observed, that if he should collect the effects or debts of the deceased found or due in England, without taking out letters of administration here, he would thereby become liable as executor *de son tort*, to the extent of the assets so received by him (*c*).

(*a*) Story's Conf., sect. 513.

(*b*) *Tyler v. Bell*, 1 Keen, 826, 829; Story's Conf., sects. 513, 514; *Flood v. Patterson*, 29 Beav. 295.

(*c*) See *ante*, p. 177 *et seq.* So an English company that, at the request of American executors, had registered a transfer into their names of their testator's shares without probate being obtained in this country, was held to have made itself executor *de son tort*: *Att.-Gen. v. The New York Breweries Co., Ltd.*, [1898] 1 Q. B. 205; [1899] A. C. 62. But in a suit in equity for an administration decree, the presence of an executor *de son tort* in Court will not dispense with that of a regular representative: *Penny v. Watts*, 2 Phil. Ob. O. 152.

CHAPTER THE FIRST.

REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS AT LAW.

No action lay at common law against an executor in which the testator could have waged his law.

AN action of *debt* did not formerly lie against an executor or administrator upon a simple contract, when the testator or intestate could have waged his law (*a*).

But stat. 3 & 4 Will. IV. c. 42, s. 13, abolished wager of law, and by sect. 14 enacted that "an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator."

Action of account.

No action of account lay against an executor or administrator at common law; because the account rested in the privity and knowledge of the deceased only (*b*): But this action was given by stat. 4 & 5 Ann. c. 16, s. 27.

No action at law lies against an executor for a general legacy:

An action does not lie against an executor for a general legacy (*c*) even though he may have expressly promised to pay (*d*).

And an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay (*e*).

(*a*) *Barry v. Robinson*, 1 N. R. 293; Wager of law or *vadiatio legis* was an ancient mode of proceeding, whereby, in an action of debt brought upon a simple contract between the parties, without deed or record, the defendant might discharge himself by swearing in a Court in the presence of compurgators, that he oweth the plaintiff nothing in manner and form as he hath declared. In the time of Lord Coke it had become customary, instead of bringing actions of debt, to bring actions upon the case upon the defendant's promise, wherein he could not wage his law. See Bac. Abr. "Wager of Law."

(*b*) Co. Litt. 89, *b*; 2 Inst. 404.

(*c*) *Deeks v. Strutt*, 5 T. R. 690. See *ante*, p. 1402.

(*d*) *Jones v. Tanner*, 7 B. & C. 542.

(*e*) See accord. *Holland v. Clark*, 1 Y. & C. Ch. C. 151, 167, *per* Knight Bruce, V.-C. See also *Johnson v. Johnson*, 3 B. & P. 169, where Lord Alvanley, C. J., observed that, "if an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a Court of Common Law would not entertain an action for money had and received against a legatee, since such a Court cannot take into consideration, as a Court of

But the law is different with respect to *specific* legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor (*f*). Therefore, a devise of chattel leaseholds may bring an action to recover them against the executor, after an assent by him to the bequest (*g*). So an action of trover will lie for a specific legacy, after the executor has assented (*h*).

secus, as to a specific legacy after assent:

It must also be observed, that executors may, by arrangement with the legatees, cease to hold the money bequeathed in their character of executors; in which case they are obviously liable to be sued at law; Thus, in *Gregory v. Harman* (*i*), the plaintiff and three others being residuary legatees under the Will of one T. P., the defendants, as the executors named in the Will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands; and it was held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. Again, in *Hart v. Minors* (*k*), E. by Will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, E. T., J. W., and J. H., and the remaining shares as therein mentioned, and appointed M. his executor, who duly proved the Will: M. having taken upon himself the execution of the Will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from so doing: Another meeting was afterwards

or where he has ceased to hold the money as executor:

Equity would do, the mode in which the funds might have been applied." See as to an action for a legacy charged on land, *Braithwaite v. Skinner*, 5 M. & W. 313.

(*f*) *Ante*, p. 1106, note (*a*). And see *Re Culverhouse*, [1896] 2 Ch. 251.

(*g*) *Doe v. Guy*, 3 East, 120.

(*h*) *Williams v. Lee*, 3 Atk. 223.

(*i*) 1 Moore & P. 209.

(*k*) 2 Crompt. & M. 700.

called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties: " To this was appended a supplemental account, containing, amongst others, the following item: "By cash retained for J. H., 179*l.* 10*s.*:" In an action for money had and received, and on an account stated, brought by J. H. against the executor to recover the amount of the legacy, it was held by the Barons of the Exchequer, that the action was maintainable, on the ground of a certain sum having been received and retained by the defendant for the plaintiff's use, by which the defendant ceased to hold the money in his character of executor (*l*).

51 & 52 Vict.
c. 43:
legacy, &c.,
not exceed-
ing 100*l.*
recoverable
in County
Court.

The jurisdiction of the County Courts is, by stat. 51 & 52 Vict. c. 43, s. 58, extended to the recovery of a demand not exceeding 100*l.*, for the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a Will (*m*).

Where money is bequeathed to an executor in trust, that is, where he has trusts to perform with respect to the bequest which do not form part of the ordinary duties of an executor, the case is not within section 58 (*n*), but a bequest, though made in terms to an executor in trust, will be within the section if the executor has really nothing more to do than he would be bound to do upon a simple bequest to a legatee (*o*). And all cases involving the administration of estates or the execution of trusts within and to the amount of 500*l.* are within the equity jurisdiction conferred on the County Courts by sect. 67.

Parties.

It has been shown (*p*), that in the case of an action brought

(*l*) See also *Gorton v. Dyson*, 1 Brod. & Bing. 219; *Moert v. Moessard*, 1 Moore & P. 8; *Rose v. Savory*, 2 Bing. N. S. 145; *Wasney v. Earnshaw*, 4 Tyrwh. 806; *Roper v. Holland*, 3 A. & E. 99; *Edwards v. Bates*, 7 M. & Gr. 590; *Bartlett v. Dimond*, 14 M. & W. 49, 56; *Pardoe v. Price*, 16 M. & W. 459, by Rolfe, B.; *Bond v. Nurse*, 10 Q. B. 244; *Edwards v. Lowndes*, 1 E. & B. 81; *Topham v. Morecroft*, 8 E. & B. 972.

(*m*) See County Courts Act, 1903, s. 3.

(*n*) *Hewston v. Phillips*, 11 Exch. 699. See further, as to what is a claim for a legacy, *Longbottom v. Longbottom*, 8 Exch. 203.

(*o*) *Pears v. Wilson*, 6 Exch. 833. See also *Re Fuller*, 2 E. & B. 573. The County Court may well try a question of *devastavit* in such a suit: *Winch v. Winch*, 13 C. B. 128. The grant of letters of administration is part of the cause of action: *Re Fuller*, 2 E. & B. 573.

(*p*) *Ante*, p. 1497.

by executors, they should all join, whether they have administered or not (*q*). But the rule as to joinder was different in actions against executors or administrators: Therefore, where the defendant pleaded in abatement that he had one or more co-executors who ought to be joined, he must have averred, not only that the co-executor was alive (*r*), but that he had *administered*; because it was only necessary to sue so many of the executors as had administered (*s*).

Formerly in an action against a married woman executrix, the husband must have been joined as a defendant, but now by the Married Women's Property Act, 1882, sect. 18, a married woman who is an executrix or administratrix alone or jointly with any other person or persons, may sue or be sued without her husband as if she were a *feme sole*; and by sect. 24 of the same Act, her husband is not subject to any liabilities by reason of any breach of trust or *devastavit* committed by her either before or after her marriage, unless he has acted or intermeddled in the administration. Where, however, a married woman administratrix is ordered to pay into Court a sum of money belonging to the intestate's estate, and shown by her account to be in her possession, the order should be in the common form, and not restricted to payment out of her separate estate in the absence of evidence that she has committed a *devastavit* (*t*). If, however, the object of the order is to compel her to make good the loss caused by her *devastavit*, the order must, it would seem, be in the form in *Scott v. Morley* (*u*), viz., against her separate estate, and no attachment for non-compliance with it can go (*w*).

Action
against
married
woman
executrix.

If one of two executors dies, an action cannot be brought

Action
against

(*q*) This, however, is subject to the operation of R. S. C. 1883, Ord. XVI. r. 11, set out *ante*, p. 1497; and see Conv. Act, 1911, ss. 8, 12.

(*r*) *Hilbert v. Lewis*, 1 Freem. 268. Pleas in abatement are now abolished.

(*s*) Bro. Exors. 20, 88; Wentw. Off. Ex. 205, 14th edit.; *Swallow v. Emberson*, 1 Lev. 161.

(*t*) *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180.

(*u*) 20 Q. B. D. 120. As to the immunity attaching to the separate property of a married woman in respect of which she is restrained from anticipation, see *Brown v. Dimbleby*, [1904] 1 K. B. 28, and cases referred to in judgment of Collins, M. R. And see also *Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35; *Gordon v. Gordon*, [1904] P. 163.

(*w*) Seton, 7th edit. 855.

surviving
executor.

against the surviving executor and the executor of the deceased executor, but must be against the survivor alone (*x*).

Executors
and ad-
ministrators
represent
the persons
beneficially
interested.

By Ord. XVI. r. 8, it is provided that trustees, executors and administrators may be sued on behalf of, or as representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties (*y*).

Effect of
defence of
plene
administravit
on form of
judgment.

There seems no reason why a plaintiff should not obtain judgment under Ord. XIV. against an executor who does not set up a defence of *plene administravit*, although an executor can of course obtain leave to defend more readily than his testator could have done. It would seem to have been decided at Chambers that, when the executor successfully sets up *plene administravit*, the plaintiff is entitled to a judgment with costs against future assets *quando acciderint*, but that the executor is entitled to costs of action as against the plaintiff (*z*).

Service on
one of two
co-executors
sufficient in
action for
recovery of
land.

Service on one of two co-executors, who are in possession of the premises, would seem to be a sufficient service in an action for recovery of land (*a*).

In an action
against exe-
cutor, as
such, the
indorsement
of the writ
should show
in what
capacity he
is sued.
Practice
prior to
Judicature
Act.

In an action against an executor, as such, he must be named executor, as it is provided by Ord. III. r. 4, that if the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show in manner appearing by such of the forms in Appendix A. Part III. Sect. VII. as shall be applicable to the case, or by any other statement to the like effect, in what capacity the defendant is sued (*b*). Under the law as it existed prior to the Judicature Act it was settled that if, upon the whole matter, the plaintiff had declared against

(*x*) 1 Roll. Abr. 928, tit. Exors. (Z). But if the executor of the executor administer with the other, an action lies against both as executors: *Ibid*. It is not necessary, as a rule, in an action for an account in the Chancery Division to add the representative of a deceased executor as a party, but where it is desirable to join such representative, Ord. XVI. r. 11 (*ante*, p. 1497), or r. 48 (as to third-party procedure) may be applied: *Re Harrison*, [1891] 2 Ch. 349.

(*y*) See *ante*, p. 1527.

(*z*) See Annual Practice, note to Ord. XIV. r. 1.

(*a*) *Doe d. Strickland v. Roe*, 4 D. & L. 431.

(*b*) There was a similar rule before the Judicature Act; see Com. Dig. Pleader (2 D. 2).

the defendant as executor, it was considered that the judgment might well be *de bonis testatoris*, although the defendant was not named executor at the beginning of the declaration (c): Thus it was enough in an action of covenant on a demise to the testator, to state that he made his Will and appointed the defendant *his executor*, who entered and was possessed *as executor*; for this averment might be traversed by the defendant (d).

Statement of claim: how defendant to be charged as executor.

Formerly a plaintiff could not have an action against a defendant to charge him as executor, and also in his own right: for the judgment in the one case was *de bonis propriis*, and in the other *de bonis testatoris* (e).

Joinder of counts.

But now by Ord. XVIII. r. 5, it is provided that "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (f). With regard to the corresponding rule of the Rules of 1875 (Ord. XVII. r. 5), Hall, V.-C., made the following observations in *Padwick v. Scott* (g): "In suing an executor or administrator it frequently becomes a question whether he should be sued as legal personal representative or personally; and the minds of the framers of Order XVII. r. 5, were directed to *Ashby v. Ashby* (h), and cases of the same class, where the executor or administrator has been dealing with the assets, or making contracts in the course of administration properly and fairly in his character of execu-

(c) *Dean of Bristol v. Guyes*, 1 Saund. 112, a; *Rann v. Hughes*, 4 Bro. P. C. 27, Toml. edit.; Com. Dig. Abatement (F. 20); *ibid.* Pleader (2 D. 2).

(d) *Holliday v. Fletcher*, 2 Lord Raym. 1510; *S. C.*, 2 Stra. 781. If the plaintiff declared in the *debet* and *detinet* against an executor or administrator, in cases where he ought to have sued in the *detinet* only, the declaration was bad on demurrer, though it was aided by verdict: *Fruen v. Porter*, 1 Sid. 379. But it was held in *Wilson v. Hobday*, 4 M. & S. 120, that no objection could be made to a declaration in the *detinet*, which might, and strictly ought to have been, laid in the *debet* and *detinet*; for a party might abridge his demand, though he could not extend it. See *ante*, p. 1372, note (n).

(e) *Herrenden v. Palmer*, Hob. 88; *Hall v. Huffam*, 2 Lev. 288.

(f) It has been held that this rule does not apply to counter-claims: *Macdonald v. Carington*, 4 C. P. D. 28. The rule will be strictly construed: *Tredegar v. Roberts*, [1916] 1 K. B. 283; and see *Re Pimm* [1916] W. N. 202; *ante*, p. 1503.

(g) 2 C. D. 736, 743.

(h) 7 B. & C. 448; *ante*, p. 1398.

tor or administrator, and then it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character, being left afterwards to get payment if he could out of the assets in a course of administration. The object of that clause was to get over such difficulties."

Defences:

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded (*i*); and in addition thereto he may specifically deny the character in which he is sued, which was formerly done by pleading *ne unques executor or administrator*; or admitting it, he may plead that he has no assets in his hands, and that either generally, or specially, with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff, or he may plead a retainer to pay his own debt of equal or superior degree, or debts of a superior degree due to third persons (*k*).

plea of
executor's
bankruptcy:

Unless a *devastavit* is suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable: as the proceedings in bankruptcy would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* (*l*).

pleas by
several
executors.

If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non-assumpsit*, their plea shall be received (*m*). Hence, if a warrant of attorney be given by one of several executors to confess judgment against them all, the Courts will order it to be delivered up (*n*). So where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given in

(*i*) Com. Dig. Pleader (2 D. 8).

(*k*) Tidd, 644, 9th edit.

(*l*) See *Serle v. Bradshaw*, 2 Cr. & M. 148; *ante*, p. 485.

(*m*) *Chaffe v. Kelland*, 1 Roll. Abr. 929, tit. Exors. (A.), pl. 1; Wentw. Off. Ex. 212, 14th edit.; *Elwell v. Quash*, 1 Stra. 20. So if two executors have judgment, and the one prays a *capias*, and the other a *fieri facias*, the *capias* shall be awarded, as best for the testator: *Foster v. Jackson*, Hob. 61, cited as the opinion of Cotismore in 7 H. 6, 6. Although the forms of pleading have been altered by the Judicature Acts, there seems to be nothing in those Acts to impugn the general principles laid down in the authorities cited for the propositions under this head in the text.

(*n*) *Elwell v. Quash*, 1 Stra. 20; Tidd. 548, 9th edit.

C. B. for both the defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only (o).

Where several executors plead a release to the testator or to themselves, and one of them afterwards makes default, this shall not be a total default in the defendants, so as to induce a judgment against them (p).

If the defendant intends to deny his being executor or administrator, he must plead such denial specifically (q); otherwise he will admit his representative character. The plea of *ne unques executor* or *ne unques administrator* is a plea in bar (r): But a plea to an action brought against the defendant as executor, that he was administrator and not executor, was, under the old system, a plea in abatement only (s), which now could be easily remedied, if necessary, by amendment. So, in an action against the defendant as administrator, a plea that he was not administrator but executor, could only be in abatement (t). So, if he were sued as administrator generally, he must have pleaded in abatement that he was administrator only *durante minoritate* (u).

Plea of *ne unques executor*, &c.:

On the trial of an issue joined on a plea of *ne unques executor* or *administrator*, the *onus* of proof is on the plaintiff, who has to prove the affirmative of the proposition.

If the fact that a party is executor is denied by the opposite party (x), proof that the defendant has intermeddled with the property, so as to make himself executor *de son tort* (y), is sufficient proof of his being executor (z).

(o) *Baldwin v. Church*, cited 1 Stra. 20. Demurrers are now abolished, but points of law which formerly would have been raised by demurrer can now be raised by the pleadings under Ord. XXV. r. 2. As to the costs where defendants sever in their pleadings, see *Stumm v. Dixon*, 22 Q. B. D. 99; *ibid.* 529.

(p) Wentw. Off. Ex. 213, 14th edit.

(q) R. S. C. Ord. XIX. r. 13.

(r) Com. Dig. Pleader (2 D. 7).

(s) *Pyne v. Woolland*, 2 Vent. 178; *Harding v. Salkill*, 1 Salk. 296; *Granwell v. Sibly*, 2 Lev. 190; Com. Dig. Pleader (2 D. 3), (2 D. 7).

(t) Com. Dig. Abatement (F. 20); Pleader (2 D. 12); Com. Dig. Pleader (2 D. 4). Now by R. S. C. Ord. XXI. r. 20, no plea or defence shall be pleaded in abatement.

(u) *Little v. Plant*, 1 Lutw. 20; Com. Dig. Pleader (2 D. 12).

(x) Such denial must be specifically pleaded: see R. S. C. Ord. XIX. r. 13.

(y) As to the acts by which a person will make himself executor *de son tort*, see *ante*, p. 177 *et seq.*

(z) See *ante*, p. 184. The plaintiff may reply that the defendant has administered: *Keble v. Keble*, 11 Hob. 49; Com. Dig. Pleader (2 D. 7);

It was said that the plaintiff would fail on an issue joined on a plea of *ne unques executor*, unless he could prove not only the appointment of the defendant as executor, but also that he had taken upon himself to act as such, or had proved the Will. But it is laid down in a book of authority, that an executor who proves the Will, though he does not otherwise administer, cannot plead *ne unques executor*; And that, if there be two executors, and one proves it in the name of both, even against the will of the other, yet he cannot plead *ne unques executor* nor administer as executor (*a*).

For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator, it is always prudent, and in some cases absolutely necessary, to give notice to the defendant to produce at the trial the probate of the Will, or the letters of administration (*b*). But it is not also necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession (*c*). Some evidence of the identity of the party, namely, that the person, described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary (*d*).

plea by administrator whose letters have been revoked:

If the defendant, being sued as administrator, pleads that before the date of the writ, his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator (*e*). Accordingly, if an administrator wastes the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he pleads the last administration committed to another, the other may reply that before the second administration committed, he had wasted the goods (*f*).

or that goods of the testator to a certain value came to the defendant's hands before administration granted: *Kellow v. Westcombe*, 1 Freem. 122; *Hinde v. Skelton*, 34 L. J. N. S. Ch. 378; 2 H. & M. 690. As to the proper plea by an executor who has administered under a Will, which has been afterwards disproved, see *ante*, p. 178, note (*l*).

(*a*) Com. Dig. Pleader (2 D. 7). See also Wentw. Off. Ex. c. 15, p. 339, 14th edit. (*b*) 2 Phill. Ev. 346, 6th edit.

(*c*) 2 Phill. Ev. 347, 6th edit.

(*d*) *Ibid*.

(*e*) *Garter v. Dee*, 1 Freem. 13, *ante*, p. 476. These goods, as in the case of goods possessed by an executor *de son tort*, shall not be assets in the hands of the new administrator, until they come to his possession: *Ibid*.; *Keble v. Keble*, Hob. 49.

(*f*) *Packman's Case*, 6 Co. 18, *b*.

Creditors in respect of debts which the testator or intestate contracted more than six years before the commencement of the suit used formerly to attempt to take the case out of the Statute of Limitations by basing the case on a count or counts upon oral or implied promises by the executor or administrator as such.

But by stat. 9 Geo. IV. c. 14, s. 1, after reciting the Statute of Limitations, 21 Jac. I. c. 16, and the Irish Act, 10 Car. I., it is enacted, that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby (*g*); and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever" (*h*).

plea of the Statute of Limitations:

Stat. 9 G. IV. c. 14:
acknowledgment or promise to be in writing signed by the party chargeable thereby:

no joint contractor to lose benefit of statute by reason only of written acknowledgment or promise of co-contractor:

(*g*) Extended to writings signed by an agent under the provisions of stat. 19 & 20 Vict. c. 97, s. 13.

(*h*) In an action by an administratrix, to which the Statute of Limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance, which the defendant promised verbally to pay: it was objected that this was within the 9 Geo. IV. c. 14: But Vaughan, B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply in cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the Statute of Limitations, that the debt has been satisfied": *Smith v. Forty*, 4 Carr. & P. 126. See also *Ashby v. James*, 11 M. & W. 542, accord. A testator being, at the time of his death, in 1857, indebted to B. on simple contract, gave by his Will his real and personal estate to his wife for life, and appointed J. and E. executors. The Will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the Will was proved, and then B. filed his bill on behalf of himself and other creditors against the widow and the executors. And it was held that the claim was barred by

But it is also provided by the same section, that "in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

effect of a
payment by
a co-
contractor:

With regard to the payment of principal or interest, it was held, that a payment by one of the makers of a joint and several promissory note took the case out of the statute, in the same manner as before the statute 9 Geo. IV (*i*).

the Statute of Limitations, for the cause of action having accrued in the testator's lifetime, whether the Will was proved or not, was immaterial, and that after six years from the last acknowledgment the Statute of Limitations is a bar to a simple contract debt of a testator, although there has been no legal personal representative to sue: *Boatwright v. Boatwright*, L. R. 17 Eq. 71. And it would seem that if the remedy of a creditor against the personal estate is barred, while his remedy against the real estate has been kept alive, the real estate can be made liable, although there is no legal personal representative: *per Jessel, M. R.*, *ibid.* p. 74. And in *Re Hollingshead*, 37 C. D. 651, it was decided that payment by a devisee for life on a simple contract debt of his testator is sufficient acknowledgment to keep the debt alive against all parties interested in remainder; the law in regard to payment of interest by a tenant for life on a simple contract debt standing on the same footing as that with respect to payment of interest on a specialty debt: *Re Chant*, [1905] 2 Ch. 225. See also *Roddam v. Morley*, 1 De G. & J. 1; *Coope v. Cresswell*, L. R. 2 Ch. 112, 126; *Re Lacey*, [1907] 1 Ch. 330. An acknowledgment of a debt by one of several executors as executor within this section is sufficient to keep the debt alive as against the others, and on the death of the executor making the acknowledgment an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors: *Re Macdonald*, [1897] 2 Ch. 181. Although as a general rule an executor may pay a statute-barred debt without committing a *devastavit*, he may not pay such a debt after it has been declared to be so barred by a Court of competent jurisdiction: *Midgley v. Midgley*, [1893] 3 Ch. 282; and see *Astbury v. Astbury*, [1898] 2 Ch. 111, 113.

(*i*) By Parke, J., in *Chippendale v. Thurston*, Mood. & M. 411; *Wyatt v. Hodson*, 8 Bing. 309. This was by reason of the proviso that the Act shall not lessen the effect of any payment, &c. See also *Burleigh v. Stott*, 8 B. & C. 36; *Channel v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 Q. B. 839. But an acknowledgment by one only of two joint mortgagees does not entitle the mortgagor to redeem where the mortgagees have been in possession for more than

But now by the 14th section of the stat. 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856), "where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the [Statutes of Limitations], or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators" (k). Stat. 19 & 20
Vict. c. 97.

But independently of this enactment where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made *after the death of the testator*, will not take the case out of the Statute of Limi-

twenty (now twelve) years: *Richardson v. Younge*, L. R. 10 Eq. 275; L. R. 6 Ch. 478.

(k) This section was held to be not retrospective: *Jackson v. Woolley*, 8 E. & B. 778, 784. "The Mercantile Law Amendment Act, 1856, dealt with part payment of principal and payment of interest, but only with regard to contractors and executors and administrators. The short effect of the enactment as to executors is that no executor shall 'lose the benefit of' the statute of James, 'so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other executor.' . . . It was said that the payment of interest by one executor affected him only, and did not in any way affect his co-executor, and the argument was pushed to the extreme length of saying that the payment involved the executor who made it in a personal liability to pay the debt. Therefore it was urged that where one of two executors having assets in his hand applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that, after the lapse of six years from the testator's death, not only is the co-executor absolved, but the testator's personal estate, whether in the hands of the co-executor or outstanding, is exempted from all liability to pay the debt, and that the creditor's sole remedy is against the executor personally who made the payment. This argument was founded on the language of the 14th section of the Mercantile Law Amendment Act, but it appears to me that the full effect may be given to every word in that enactment without producing so extraordinary a result. Some reasonable interpretation may be put on the words 'so as to be chargeable' which would stop short of such a conclusion; as, for instance, by holding that the co-executor who has not paid is not to be personally chargeable as for a *devastavit* in paying over to beneficiaries assets which have come to his hands. But I dissent altogether from the proposition that the executor by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor, that is, out of the personal assets of the testator. The inference or implication must be consistent with the facts from which it is drawn or raised, and it would be wholly inconsistent with the facts to hold that in such a case as that supposed the executor had incurred any personal liability": *per* Chitty, J., *Re Hollingshead*, 37 O. D. 651, 657. And see *per* Stirling, J., in *Re Macdonald*, [1897] 2 Ch. 181, at pp. 188, 189.

tations: Thus, in *Atkins v. Tredgold* (l), A. and B. made a joint and several promissory note: A. died, and ten years after his death B. paid interest upon the note: In an action brought upon the note against the executor of A., it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executors liable. Nor will it make any difference that the surviving joint contractor is the executor of the deceased: for it is clear that acts done by a surviving partner, who is executor of the deceased partner, and which the surviving partner was in that character bound to do, cannot *primâ facie* be considered to have been done in the character of executor (m). Again, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor (n). Therefore, in *Slater v. Lawson* (o), it was holden, that after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party would not take the debt out of the Statute of Limitations as against the survivor.

In *Douglas v. Forrest* (p), an action was brought against an executor on a Scotch judgment recovered against his testator: The defendant after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit: To this there was a replication, that the deceased, at the time the action accrued, was beyond seas, and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took on himself the burden and execution of the Will: and it was holden, that this replication was a good answer to the plea, the Court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action," until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no

(l) 2 B. & C. 23.

(m) *Way v. Bassett*, 5 Hare, 55; *Brown v. Gordon*, 16 Beav. 302. But see *Braithwaite v. Britain*, 1 Keen, 206; *Griffin v. Ashley*, 2 C. & K. 139.

(n) 1 B. & Ad. 398.

(o) 1 B. & Ad. 396.

(p) 4 Bing. 686.

person in England against whom the plaintiff could proceed, until the defendant took upon him the execution of the Will (q).

But it is no answer to a plea of the Statute of Limitations that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his Will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted: For, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued, from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run (r).

Death of debtor after cause of action accrued is no answer to a plea of the statute.

(q) See also *Story v. Fry*, 1 Y. & C. C. C. 603; accord. It must be observed that it seems to have been the better opinion that even before the statute of Anne the exception in the statute 21 Jac. I. c. 16, in favour of persons being beyond sea, extended only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were; because only *creditors* are mentioned in the statute: *Hall v. Wyborn*, 1 Show. 99; 2 Saund. 121, b, note (4). And now by the statute 4 Anne, c. 16, s. 19, it is enacted that if any person *against whom* any action lies for seamen's wages, trespass, detinue, trover, replevin, action of account, or upon the case (or other actions mentioned in 21 Jac. I. c. 16, s. 3), was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return as is limited for such action by the statute of 21 Jac. I. c. 16, and 4 Anne, c. 16. The latter statute, however, does not appear to have been relied on either by the counsel or Court, in the above case of *Douglas v. Forrest*. But the decision is stated by Lord Denman in delivering the judgment of the Court of Exchequer Chamber in *Rhodes v. Smethurst*, 6 M. & W. 353, to have proceeded on the equity of that statute. See further, as to the construction of the statute of Anne, *Towns v. Mead*, 16 C. B. 123. Absence beyond seas of the plaintiff or one of the plaintiffs is no longer a disability, and the period of limitation will run as to joint debtors within the jurisdiction, though some be without it: 19 & 20 Vict. c. 97, ss. 10, 11. See *ante*, p. 1511.

(r) *Rhodes v. Smethurst*, 4 M. & W. 42, affirmed in the Exchequer Chamber, 6 M. & W. 351; *Freake v. Cranefeldt*, 3 M. & Cr. 499. As to the remedy of a creditor where there is no personal representative, see *Webster v. Webster*, 10 Ves. 93; and *Re Lovett*, 3 C. D. 198, and the cases there cited, as to whether a legal representative of a testator is a necessary party to an administration suit where an executor *de son tort* and trustees of the real estate are before the Court. It appears to be clear that where the object of the action is a general administration of the estate, a general personal representative is necessary (see *Rowsell v. Morris*, L. R. 17 Eq. 20; *Dowdswell v. Dowdswell*, 9 O. D. 294; Dan. Ch. Pr. 8th edit. p. 156), although R. S. O. 1883, Ord. XVI. r. 46, now provides that the Court may, in a proper case, appoint a person to represent the estate, or proceed in the absence of a representative. See further, as to the position of an administrator *pendente lite* of the personal estate of the deceased, appointed under sect. 70 of the Probate Act, 1857, *Re Toleman*, [1897] 1 Ch. 866.

Title to land once extinguished cannot be revived by acknowledgment.

Where a title to land has under sect. 34 of 3 & 4 Will. IV. c. 27, become extinguished it cannot be revived by acknowledgment. For instance, where a tenant in common had gained an adverse title under the statute to another share of the property, it was held that no payment of rent or acknowledgment by him could restore the title so extinguished (*s*). The statute 21 Jac. I. c. 16, differs in this respect, since it merely bars the remedy and does not extinguish the right.

Writ remains in force twelve months, but may with leave be renewed.

A writ of summons remains in force under R. S. C. 1883, Ord. VIII. r. 1, for twelve months, and may with leave be renewed from time to time for six months, and when so renewed will prevent the cause of action being barred under the Statute of Limitations from the date of the issuing of the original writ; but where a writ was issued in the Common Pleas against an administrator for a debt not then barred by statute, but was never served, and within six months after the issuing of the writ (at which time the debt was barred unless saved by the writ), the creditor took out an administration summons, Malins, V.-C., held, under the corresponding section (sect. 11) of the Common Law Procedure Act, 1862, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit (*t*).

Statute of Limitations may be pleaded by trustees.

By sect. 8 (*u*) of the Trustee Act, 1888 (51 & 52 Vict. c. 59), in which Act the term "trustee" shall be deemed to include an executor or administrator (*x*), provision is made for enabling trustees to plead the Statute of Limitations in certain cases.

Although, where the plaintiff died, a writ by journeys accounts could not be brought by his executor (*y*), yet if a *defendant* died, the plaintiff might pursue this writ against the personal representative, provided the action was of a nature such as would survive against an executor or administrator (*z*): and in such case, if the defendant pleaded the Statute of Limitations, the plaintiff might reply a writ newly brought by journeys accounts (*a*); and the executor of an executor must

(*s*) *Sanders v. Sanders*, 19 C. D. 373.

(*t*) *Manby v. Manby*, 3 C. D. 101.

(*u*) This section will be found fully set out and dealt with, *post*, Ch. II. (*x*) Sect. 1, sub-sect. 3.

(*y*) See *ante*, p. 1507, note (*o*), for an account of this writ.

(*z*) *Kinsey v. Heyward*, 1 Lord Raym. 432. But there is some conflict between the authorities on this point. See the judgment of Lord Lyndhurst, in *Davies v. Lowndes*, 6 M. & Gr. 534; 1 Phil. Ch. C. 340.

(*a*) *Kinsey v. Heyward*, 1 Raym. 432; Com. Dig. Abatement (P.).

have pleaded that he had fully administered on the day of the first writ purchased (*b*). So if the plaintiff commenced an action against the deceased within six years of the accruing of the cause of action, and such action abated by his death, a reasonable time was allowed to the executor for bringing a fresh action either according to the principle of the old writ by journeys accounts, or according to an equitable construction of the 4th section of the statute (*c*). A year has been said to be a reasonable time, but the executor, if he use due diligence, is not bound to bring the action within a year from the death of the deceased, *e.g.*, if the defendant has made it impossible to do so by delaying to take out administration (*d*). The same equitable construction has been applied to the limitation of actions on bonds, &c., imposed by the statute 3 & 4 Wm. IV. c. 42, s. 3 (*e*).

Notwithstanding the fact that actions no longer abate by death (*f*) it is still open to a plaintiff where the defendant dies to bring a new action against the executors within a year from probate and thus to take the case out of the Statute of Limitations. Thus in *Swindell v. Bulkeley* (*g*), a writ was issued, but before service the defendant died. Within a year from probate of the Will a fresh writ was issued against the executors for the same cause of action, but in the meantime the six years had expired. It was held that the old procedure was still available, and that the Statute of Limitations afforded no defence to the action. An alternative procedure is to apply under R. S. C. 1883, Ord. XVII. r. 2, to add the executors as parties (*h*).

A defendant sued as executor or administrator, cannot set off a debt due to himself personally (*i*), nor, if sued for his own debt, can he set off what is due to him as executor or adminis-

Plea of
set-off:

(*b*) *Spencer's Case*, 6 Co. 10, *b*; Doct. Plac. Exors. 2, p. 170, edit. 1677.

(*c*) See *ante*, pp. 1508, 1509.

(*d*) *Curlewis v. Lord Mornington*, 7 E. & B. 283; *S. C.*, in error, 27 L. J. Q. B. 489.

(*e*) *Sturgis v. Darell*, 4 H. & N. 622; *S. C.*, in error, 6 H. & N. 120.

(*f*) R. S. C. 1883, Ord. XVII. r. 1, repeating the similar provision in the Common Law Procedure Act, 1852.

(*g*) 18 Q. B. D. 250.

(*h*) See also r. 4 of the same Order, which provides for carrying on the proceedings between the continuing parties and the new parties.

(*i*) *Re Dickinson*, W. N. (1888), 94; *Phillips v. Howell*, [1901] 2 Ch. 773.

trator (*k*): because the debts sued for and intended to be set off must be mutual, and due in the same right (*l*). But it has been held that to a declaration in debt or assumpsit against an executor, on an account stated by him *as executor*, a set-off for debts due from the plaintiff to the testator may well be pleaded; for that an account stated by an executor as such must be taken to show a debt due from his testator to the plaintiff (*m*).

plea of *plene
adminis-
travit*:

If the executor or administrator has not assets to satisfy the debt, upon which an action is brought against him, he must take care to plead *plene administravit* or *plene administravit præter*, &c. (*n*). For it was said prior to the Judicature Acts that a judgment against an executor or administrator, whether by default or on demurrer (*o*), or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra* (*p*), was conclusive upon him that he had assets to satisfy such judgment (*q*). But that if the executor pleaded either a general or special *plene administravit*, he was liable only to the amount of assets proved to be in his hands; and a judgment against an executor, on a verdict upon *plene administravit*, was only an admission of assets to the extent of assets proved to be in his

(*k*) *Nelson v. Roberts*, 69 L. T. 352.

(*l*) *Bishop v. Church*, 3 Atk. 691; *Gale v. Luttrell*, 1 Y. & Jerv. 180; cf. *Bailey v. Finch*, L. R. 7 Q. B. 34, discussed *ante*, p. 1504; *Ex parte Morier*, 12 C. D. 491. Set-off is now governed by R. S. C. Ord. XIX. r. 3, as to which, and as to set-off against an executor, see *ante*, p. 1501 *et seq.* An administrator is entitled to set off against the share of one of the next of kin the whole of a debt due from him to the intestate's estate, part of which debt has become barred by the Statute of Limitations: *Re Cordwell's Estate*, L. R. 20 Eq. 644.

(*m*) *Blakesley v. Smallwood*, 8 Q. B. 538. But it may be argued that the debt, *on which the action is founded*, is the debt which arises, after the death of the testator, on the account stated between the executor and the plaintiff; and that, therefore, in truth, this case, as well as *Mardall v. Thellusson*, 18 Q. B. 857, 6 E. & B. 976, was overruled by *Rees v. Watts*, 11 Exch. 410, and *Newell v. Nat. Prov. Bank of England*, 1 C. P. D. 496, *ante*, p. 1501, note (*m*). See also *Re Gregson*, 36 C. D. 223. In *Mardall v. Thellusson*, the defendants were sued as executors for a debt which accrued due from their testator in his lifetime, and it was held that they might set off a debt which had accrued due from the plaintiff to them as executors since the death of their testator.

(*n*) See *Re Marvin*, [1905] 2 Ch. 490. For forms of these pleadings, see Bullen & Leake, 7th edit. p. 561 *et seq.*

(*o*) *Rock v. Leighton*, 1 Salk. 310; S. P. admitted 3 T. R. 686; *Leonard v. Simpson*, 2 Bing. N. C. 176.

(*p*) *Ramsden v. Jackson*, 1 Atk. 292; *Erving v. Peters*, 3 T. R. 685.

(*q*) 1 Saund. 219, *b*, note to *Wheatley v. Lane*.

hands (*r*). And the substance of these propositions would still seem to be true, as showing the onus of pleading even under the Judicature Acts (*s*).

The essential part of the plea of *plene administravit* was, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, *or had, at the time of the commencement of the suit, or ever since*": and the omission of any of the above averments, was always held fatal on demurrer, as well in a general as a special *plene administravit*.

Under the old pleading rules there was a great deal of discussion (*t*) as to whether the words "*or ever since*" were essential to the plea of *plene administravit*, and whether the judgment of assets *quando acciderint* would embrace assets received between writ and judgment, and it seems ultimately to have been decided that the words were not essential, and that the judgment of assets *quando acciderint* embraced all assets received after writ. All this seems immaterial since the Judicature Acts, except in so far as it shows, on the one hand, that if a defendant executor wishes to rely upon a payment of a creditor since writ issued, as a *pro tanto* discharge under the rule in equity, he would have to specifically allege the fact in his defence, as was done in *Vibart v. Coles* (*u*), and not rely on a general statement that the defendant had fully administered the estate, and that there were no assets for the payment of the plaintiff's debt: and, on the other hand, that if a plaintiff wishes to rely on the receipt of assets after writ, he should allege such receipt in his reply to the defence of *plene administravit* (*v*). The importance of these matters is, however, largely diminished by the power of amendment under the Judicature Act, but these amendments sometimes involve adjournment and payment of costs.

Again, in an action brought against the executor of an executor, it was not sufficient to plead that the defendant had not any goods or chattels of the original testator in his hands

(*r*) 1 Saund. 219, *b*, note. *Cousins v. Paddon*, 2 Cr. M. & R. 558, *per* Parke, B.; *Re Higgins' Trusts*, 2 Giff. 562.

(*s*) *Thompson v. Clarke*, 17 T. L. R. 455; and see *Lacons v. Warmoll*, [1907] 2 K. B. at p. 360.

(*t*) See Wms. Exors. 8th edit. pp. 1964, 1992.

(*u*) 24 Q. B. D. 364.

(*v*) See *post*, p. 1567, note (*g*).

to be administered; but he must also plead, either that the first executor fully administered, or that he the said defendant had no assets of the first executor out of which he could satisfy any *debt* committed by the first executor (*x*). And such matters would seem to be essential to the substance of the defence.

*plene
administravit
præter.*

Again, an executor was *bound* to plead a debt of a higher nature, of which he had notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he had not assets for both: otherwise it would be an admission of assets to satisfy both debts (*y*). Thus the executor was bound to plead a judgment recovered against the testator, in bar of an action on a bond; otherwise he would admit that he had assets to satisfy the judgment (*z*).

It will be remembered that since Hinde Palmer's Act (32 & 33 Vict. c. 46), specialty debts have not, in the administration of the estate of any person dying on or after January 1st, 1870, any priority over simple contract debts, but a plea or defence such as that in the text will still be necessary in some cases, *e.g.*, in the case of an outstanding judgment (*a*).

If the judgment pleaded was recovered against the testator and another, the plea had to aver the survivorship of the testator (*b*).

An unregistered judgment obtained against the executor himself before administration decree has priority over all debts of equal degree, and under 32 & 33 Vict. c. 46, specialty and simple contract debts are of the same degree (*c*). But now by sect. 10 of the Judicature Act, 1875, as to persons dying after the 1st November, 1875, the rule in bankruptcy that all debts are to be paid *pari passu* applies in the administration by the Court of an insolvent estate in Chancery (*d*).

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the

(*x*) *Wells v. Fydell*, 10 East, 315.

(*y*) *Rock v. Leighton*, 1 Salk. 310; *ante*, p. 792.

(*z*) *Earle v. Hinton*, 2 Stra. 732.

(*a*) See *ante*, p. 782. And note that an unregistered judgment ranks only as a simple contract debt: *Van Gheluive v. Nerinckx*, 21 C. D. 189.

(*b*) *Trethewey v. Ackland*, 2 Saund. 50.

(*c*) *Re Williams' Estate*, L. R. 15 Eq. 270; *Re Stubbs' Estate*, 8 C. D. 154.

(*d*) *Re Whitaker*. [1901] 1 Ch. 9, disapproving *Re Maggi*, 20 C. D. 545. See *ante*, p. 771.

executors or administrators for another debt of the testator or intestate (e).

It may be observed, that a plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenere non debet*, even where the judgment has been confessed after action brought, and pleaded *puis darrein continuance*; contrary, apparently, to the general rule, that a matter of defence, arising after action brought, cannot be properly pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit (f). But this arises from the peculiar nature of the action, which is brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets, supposed to be in his, the executor's, hands, liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor in preference to the plaintiff, in the suit first brought, and thereby, to the extent of the assets then in hand, to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, *viz.*, that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor, pending the writ, enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets (g).

(e) *Further v. Further*, Cro. Eliz. 471.

(f) *Le Bret v. Papillon*, 4 East, 502.

(g) *Le Bret v. Papillon*, 4 East, 508. Matters arising pending action may be pleaded by way of defence under the provisions of R. S. C. Ord. XXIV., and inasmuch as an executor or administrator may prefer one creditor to another, the payment of one creditor, after an action has been commenced by another, may be set up in answer to such action. Thus in *Vibart v. Coles*, 24 Q. B. D. 364, following *Re Radcliffe*, 7 C. D. 733, the defendant, an administratrix, after action brought against her for money lent to the intestate by the plaintiff, consented to a Judge's order for judgment in a subsequent action by another creditor for a debt due from the intestate, and, judgment being signed accordingly, she paid the amount of the

Plea of
retainer:
for debt due
from testator
to executor;

The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased, have been investigated in a previous part of this Treatise (*h*).

for disburse-
ments by
executor;

It was held to be optional in the executor or administrator either to *plead* a retainer for such a debt, or to give it *in evidence* under a plea of *plene administravit* (*i*). So he might either plead, or show in evidence under that plea, that he retained assets to a certain amount, for the expenses of the funeral (*k*), or of taking out administration (*l*), or to reimburse himself for payments made out of his own pocket, in discharge of debts not inferior in their kind to the debt of the plaintiff before the commencement of the suit (*m*). But a retainer for unsatisfied debts of the testator or intestate, of a higher degree than that on which the action is brought, must be pleaded (*n*).

for debts
outstanding.

Replication
to a plea of
*plene
administravit
præter*.

Where an executor pleaded that he had no assets *ultra* a judgment, which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff might reply, that the judgment was had and obtained by fraud and covin between the executor and the creditor (*o*). But the plaintiff could not traverse the averment that the debt, for which the judgment was had, was a just and true debt (*p*).

debt, and thereby exhausted the assets, and it was held that she was entitled to make such payment, and thereby defeat the plaintiff.

There was formerly a conflict between the rules of common law and equity on this point, the common law holding that an executor or administrator, though he could confess judgment, could not, and equity that he could, pay one creditor before another; but since the Judicature Act, 1873, s. 25, sub-s. 11, the equity rule prevails: *ibid*. Whether or not such a defence requires to be pleaded as a matter arising after action brought or after the expiry of the time limited for defence under Ord. XXIV., does not seem ever to have been decided. If it is necessary so to plead it, and the defendant cannot merely give in evidence under a plea of *plene administravit* the fact that since action brought he has paid a creditor other than the plaintiff, and thus exhausted the assets, the plaintiff, according to the words of the rule, would be entitled to confess the defence and sign judgment for his costs, unless he elected to take a judgment of assets *quando acciderint*.

(*h*) *Ante*, p. 797 *et seq.*

(*i*) 1 Saund. 333, note (6); *Re Marvin*, [1905] 2 Ch. 490. Having regard to the terms of R. S. C. Ord. XIX. r. 4, it would seem prudent in every case to allege the facts upon which any retainer, which it is sought to set up, is based.

(*k*) See *R. v. Wade*, 5 Price, 621, as to the form of such a plea.

(*l*) *Gillies v. Smither*, 2 Stark. N. P. C. 528.

(*m*) Co. Lit. 283, *a.*; Bull. N. P. 140.

(*n*) Bull. N. P. 141. Since *Hinde Palmer's Act* (32 & 33 Vict. c. 46), specialty debts have no priority. See *ante*, p. 782.

(*o*) *Williams v. Fowler*, 1 Stra. 410; 2 Saund. 50, note (3).

(*p*) *Robinson v. Corbett*, 1 Lutw. 662, by Powell, J.; 2 Saund. 50,

So the plaintiff might reply that the judgment is kept on foot by covin to defraud the creditors, viz., "that the said defendant defers procuring acknowledgment of satisfaction to be entered of the said debt and damages, so recovered, &c. with intent to defraud him the said plaintiff:" As where the executor compounded for a less sum and did not procure the judgment to be discharged, but pleaded it to an action brought against him by another creditor, he might reply the composition, and that the judgment was kept on foot by covin: for nothing shall be allowed to the executor but what he actually pays (*q*).

The executor, in his rejoinder to replications of this description, was bound to traverse the fraud. And the plaintiff might, upon this issue, give in evidence, either that the debt was not a just one. or that less was due than the sum for which judgment had been given (*r*).

In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant might show that the judgment was entered for more than was due, by mistake (*s*). If a judgment was pleaded, and *per fraudem* replied, upon which issue was taken, and it appeared in evidence that the creditor was willing to take less than was recovered, it was proof of fraud; but if it were shown that the administrator had not assets to pay that sum, it was no fraud (*t*). It should be observed, that where a judgment was obtained against an executor by covin, but for a just debt, the creditor could not avoid the judgment by alleging that it was obtained by covin to defraud him (*u*).

If an executor or administrator pleads *plene administravit* and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed, or ought to have existed, in the hands of the defendant at the time of the writ sued out (*x*). The question, as

Evidence for plaintiff upon issue joined on plea of *plene administravit*.

note (3). Indeed, it was not necessary for an executor who pleaded an outstanding judgment, to aver that the debt, upon which the judgment was obtained, was a just and true debt: 1 Saund. 329, note (3).

(*q*) 1 Saund. 334, note (9).

(*r*) 2 Saund. 50, note (3).

(*s*) *Pease v. Naylor*, 5 T. R. 80.

(*t*) *Per curiam*, in *Parker v. Atfield*, 1 Salk. 312.

(*u*) *Veale v. Gatesdon*, W. Jones, 92, 3rd Resolution; *Williams v. Fowler*, 1 Stra. 410; 1 Saund. 334, note (9).

(*x*) *Mara v. Quin*, 6 T. R. 10; *Webster v. Blackman*, 2 Fost. & F. 490.

to what shall be considered assets come to the hands of the executor or administrator, has been already discussed (y).

The plaintiff could not have proved, under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted to such proof, he should have replied this matter specially (z).

If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit* (a).

Proof of
assets by
production of
inventory.

In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the Court of Probate: And after the inventory is put in, it is for the defendant to discharge himself of the items (b).

In *Shelly's Case* (c), Lord Holt said, that all separate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. Again, in *Smith v. Davies* (d), Lord Hardwicke held, that if in the inventory produced the article concerning debts does not distinguish between sperate and desperate, it will be sufficient to charge the executor with the whole *primâ facie* as assets, and

(y) *Ante*, p. 1281 *et seq.* In *Britton v. Jones*, 3 Bing. N. C. 676, upon a plea of *plene administravit* and replication of assets in hand at the time of the commencement of the suit, it appeared at the trial, that the testator, twelve months before his decease, purchased twelve mahogany chairs, which were seen in the house where he lived shortly before his death: The defendant proved that the deceased died poor, that he lodged in the same house with his mother and his sister, the defendant; and that money was borrowed to bury him: It was contended that, as it had not been proved that the furniture in question ever came to the hands of the defendant, there was no evidence to charge her with it as assets; but the Court of C. P. held that there was a *primâ facie* case for that purpose. See also *Stroud v. Dandridge*, 1 Car. & K. 445.

(z) *Mara v. Quin*, 6 T. R. 11; 2 Phill. Ev. 347, 6th edit.; Roscoe, Nisi Prius Evidence, 16th edit., 1218.

(a) Wentw. Off. Ex. c. 18, p. 312, 14th edit. This finding by the jury of assets in the hands of the executor is not against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he has not rightfully parted from them; according to the rule, *pro possessore habetur qui dolo aut injuriâ desiit possidere*: *Ibid.* See *Reeves v. Ward*, 2 Bing. N. C. 235; *S. C.*, 2 Scott, 296.

(b) *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(c) 1 Salk. 296.

(d) Bull. N. P. 140; *S. C.*, Selwyn's N. P. 779, note, 6th edit.

put upon him to prove any of them desperate; as if the article were, "Item, for debts due and owing, which I admit myself to be charged with when recovered or received" (e). And the authority of these cases appears to have been recognised and acted upon in the Common Pleas, in a case in the time of Dallas, C. J. (f). But in *Giles v. Dyson* (g), where on the trial of an issue joined on a plea of *plene administravit*, it was contended, on the authority of *Smith v. Davies*, that certain debts which the defendant had, in an inventory exhibited in the Ecclesiastical Court, allowed to be due to the estate and which he did not represent to be desperate, were to be considered as actual assets in his hands, Lord Ellenborough said, "You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a number of other circumstances; but upon the plea of *plene administravit*, it is necessary to prove that effects came into the hands of the defendant; this is the universal practice" (h).

The inventory would seem to be only *primâ facie* evidence, and it may be doubtful whether an inventory made or exhibited by one executor or administrator would be even *primâ facie* evidence against another (i).

Inventory
only *primâ
facie*
evidence.

The amount of the probate stamp was *admissible* in evidence, on the issue joined on a plea of *plene administravit* (k). And the Court of King's Bench, in *Foster v. Blakelock* (l), held that the probate stamp was *primâ facie* evidence that the executor had assets to the amount covered by the stamp (m). But this decision, it would seem, must now be considered as overruled. In the case of *Stearn v. Mills* (n), Littledale, J., and Parke, J., expressed their dissent from it: And in the subse-

Amount of
probate
stamp
admissible in
evidence.

(e) The defendant proved, by a witness, who went to demand several of them, that he could not recover them, and accordingly they were allowed as desperate: Selw. *ubi supra*.

(f) *Young v. Cawdrey*, 8 Taunt. 734; S. C., *nomine Young v. Cordery*, 3 B. Moore, 69.

(g) 1 Stark. N. P. C. 32.

(h) See *ante*, p. 1283.

(i) *Stearn v. Mills*, 4 B. & Ad. 657. The same would probably be true of the account of the personal estate to be delivered pursuant to 43 Vict. c. 14, s. 10, and of the accounts which are annexed to the Inland Revenue affidavit, pursuant to sect. 8 (3) of the Finance Act, 1894 (57 & 58 Vict. c. 30).

(k) *Mann v. Lang*, 3 Ad. & E. 699.

(l) 5 B. & C. 328.

(m) See also *Curtis v. Hunt*, 1 C. & P. 180, where Lord Tenterden ruled to the same effect.

(n) 4 B. & Ad. 657.

quent case of *Mann v. Lang* (o), Littledale, J., said, that he could not say that the stamp on the probate was not admissible; but it was not *primâ facie* evidence of the amount of assets: In the same case Lord Denman expressed his opinion, that if there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is *primâ facie* evidence of such amount; though it is not of itself evidence of such amount: But Paterson, J., was of opinion, that it is not such *primâ facie* evidence, even if a long acquiescence is shown. This subject was again considered in the Court of Chancery, in the case of *Lazonby v. Rawson* (p), where Lord Cranworth, C., in giving judgment, said, "The circumstance of an executor having paid probate duty up to a particular amount, may be *primâ facie* evidence of his having thought that the testator had died possessed of property represented by the amount of the stamp duty paid: But the probate duty is, in the first instance, payable on the whole of the personal estate left by the testator: If it cannot all be got in, and it should be ascertained that it was not of the value represented, in such a case provision is made for enabling the executor to get a return of the amount overpaid: Where, therefore, an executor has not made any application for the return of the duty which he may have paid in excess, it is a step in evidence towards proving an admission of assets to the amount, though by no means conclusive evidence that the executor had made a correct estimate of the testator's property. Much might depend on the amount overpaid, and the pecuniary condition in life of the executor, whether he would be at the trouble of getting a return of the excess of duty overpaid. Here the executor paid 40*l.* in respect of probate duty, and never got back any of it, and I think it certainly amounts to strong presumptive evidence that he had received assets to the extent covered by that amount of duty; but it is not an absolute admission that he did."

An admission by the defendant, that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets: for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit*, by paying this debt before others of a higher nature (q). But if an executor com-

(o) 3 Ad. & E. 699.

(p) 4 De G. M. & G. 556; cf. *Lloyd v. Coote*, ante, p. 1507.

(q) *Hindsley v. Russell*, 12 East, 235; 2 Phillim. Ev. 348, 6th edit.

pound with the creditors, and afterwards, at the suit of any of them, plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the Court would not suffer him to give evidence of no assets (*r*). However, an executor will not admit assets by paying interest on a bond due from the testator (*s*): for it would be unreasonable that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal (*t*).

Compound-
ing with
creditors is
an admission
of assets to
pay the
composition.

In answer to the proof of assets, the executor or administrator may show under the issue joined on *plene administravit* (*u*), that he has exhausted the assets, by discharging other demands on the estate, not inferior in their nature to that of the plaintiff (*x*), or even by the payment of debts of inferior degree, without notice of the plaintiff's demand (*y*). Again, the executor may show that he has disbursed the assets in the expenses of the funeral, or of probate (*z*), or administration, or, as it should seem, in the reasonable charges of collecting the debts of the deceased (*a*). So he may show that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them (*b*).

Evidence for
executor that
the assets
have been
exhausted.

Where the executor shows payments made by him to the

If the executor refers a party to a third person, for information respecting the effects of the testator, it would seem that an admission of assets by such third person will bind the executor: *Williams v. Innes*, 1 Camp. 364.

(*r*) Bull. N. P. 145.

(*s*) *Cleverley v. Brett*, cited by Buller, J., 5 T. R. 8; 2 Phillim. Ev. 348, 6th ed.

(*t*) See further as to what is an admission of assets, *post*, p. 1610.

(*u*) *Reeves v. Ward*, 2 Bing. N. C. 235.

(*x*) See *ante*, p. 791 *et seq.*

(*y*) *The Governors of Chelsea Waterworks v. Cowper*, 1 Esp. N. P. C. 277; *ante*, p. 792. But according to the judgment of Lawrence, J., in *Hickey v. Hayter*, 6 T. R. 388, these payments without notice must be pleaded.

(*z*) It is a question for the jury whether the executor has committed a *devastavit* by swearing the property above its value without reasonable ground, and so incurring a greater stamp duty than was requisite, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property: *Jackson v. Bowley*, Carr. & M. 97.

(*a*) *Giles v. Dyson*, 1 Stark. N. P. C. 32. But he cannot be allowed for disbursements in the schooling, feeding, and clothing of the children of the testator, subsequently to his decease: *Ibid*.

(*b*) See *ante*, p. 1568; *Gillies v. Smither*, 2 Stark. N. P. C. 528.

extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets first proved to have come to his hands (*c*).

The defendant could not, under a plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature; such defence must have been pleaded (*d*), and probably now also must be pleaded.

Again, the defendant could not show, in answer to proof of assets, that he had applied them in the payment of debts since the commencement of the suit; for under *plene administravit*, no payments, made after the action commenced, could be given in evidence (*e*). If, therefore, the executor had paid other creditors of superior degree after action commenced, he must have pleaded that matter specially, and if he has paid other creditors of equal degree, since the writ issued, he ought, it would seem, to plead the fact specifically (*f*).

It would seem (as there has already been occasion to point out) (*g*), that if, in the distribution of assets, a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*h*). So where a party entitled to a legacy

(*c*) *Marston v. Downes*, 1 A. & E. 31.

(*d*) Bull. N. P. 141; 1 Saund. 333, *a*, note (8); *ante*, p. 791.

(*e*) *Dyer*, 32, *a*, in *margin*; Com. Dig. Admon. C. (2); *Nightingale v. Lee*, 1 Freem. 110.

(*f*) R. S. C. Ord. XIX. r. 4.

(*g*) *Ante*, p. 1082.

(*h*) *Richards v. Browne*, 3 Bing. N. C. 499, by Tindal, C. J.; *ante*, p. 1082. It was held in *Jewsbury v. Mummery*, L. R. 8 C. P. 56, that a defence of this character could be properly pleaded under a plea of *plene administravit*: probably now it would have to be specifically pleaded under R. S. C. 1883, Ord. XIX. r. 4. A creditor does not lose his right to sue the executors by mere laches. But if the creditor misleads the executors, so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*. Although C. J. Tindal uses the word "laches," he does not mean that mere doing nothing will deprive the creditor of his remedy; he means "conduct": *per Chitty, J.*, *Re Birch*, 27 C. D. 622. There is no rule in equity any more than in law that the mere non-suing by any specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. And therefore if an executor disposes of the estate of the testator without providing for a liability of the testator under a covenant, he will be liable for the amount as upon a *devastavit*, even

under a Will has a claim against the testator, which he conceals from the executors till after he has received his legacy, he cannot afterwards, in an action against the executors, object that the amount of the legacy was not paid in a due course of administration (*i*).

Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him must be, that the plaintiff do recover the debt and costs to be levied *out of the assets of the testator*, if the defendant have so much; but if not, then *the costs out of the defendant's own goods* (*k*). So where the executor pleads *plene administravit*, and it is found against him, the judgment is *de bonis testatoris, et si non, &c.*, then the costs *de bonis propriis* (*l*).

Judgment
against an
executor:

It was formerly held that where the defendant pleaded *ne unques executor or administrator*, or a release to *himself*, and it was found against him, the judgment was, that the plaintiff do recover both *the debts and costs*, in the first place, *de bonis testatoris, si, &c.*, and *si non, &c.*, *de bonis propriis* (*m*). The reason alleged was, because the executor could not but know these to be false pleas: But the same reason seems equally to apply to other pleas where the judgment was different (*n*). And this probably would be held no longer to be law, especially as the rule was rather a pleading result, deduced from pleading admissions, which the Court would not let the defendant remedy by amendment, than a punishment inflicted by the Court, which had indeed no jurisdiction to inflict such a punishment.

after the lapse of eighteen years: *Re Baker*, 20 C. D. 230. See also *ante*, p. 1081.

(*i*) *Stroud v. Stroud*, 7 M. & Gr. 417.

(*k*) 1 Saund. 335, note (10), to *Hancock v. Proude*; *Gorton v. Gregory*, 3 B. & S. 90. The Court refused, after a lapse of six years, to allow a judgment for the debt *de bonis testatoris*, and for the costs *de bonis testatoris et si non de bonis propriis*, to be altered to a judgment generally *de bonis testatoris et si non de bonis propriis*, even if the latter were clearly the judgment to which the plaintiff was entitled: the distinction being between an alteration to *discharge*, and one to *fix* the personal liability of the executor: *Burroughs v. Stevens*, 5 Taunt. 556.

(*l*) 1 Roll. Abr. 931 (D.), pl. 3; Wentw. Off. Ex. 344, 14th edit.; *post*, p. 1581.

(*m*) Bro. Exors. 34; 1 Roll. Abr. p. 930 (C.), pl. 2, S. p. 933, pl. 15; *Bull v. Wheeler*, Cro. Jac. 648; Wentw. Off. Ex. 338, 340, 14th edit.; 1 Saund. 333, *b*, note (10); *Hooper v. Summersett*, Wightw. 20, *per curiam*.

(*n*) 1 Saund. 333, *b*, note (10).

for what
amount
judgment
shall be
upon a plea
of *plene*
adminis-
travit:

With respect to the *amount* for which judgment should be entered against the executor upon a plea of *plene administravit*, if the executor plead either a general or special *plene administravit*, he is liable only to the amount of the assets proved to be in his hands (*o*). Thus in *Harrison v. Beccles* (*p*), the plaintiff, having proved a debt of 80*l.*, took a verdict on the *non assumpsit* for the sum, and having proved 25*l.* assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando, &c.*, for the residue (*q*).

(*o*) 1 Saund. 219, *b*, note to *Wheatley v. Lane*; *Jackson v. Lyon*, Carr. & M. 97.

(*p*) Cited 3 T. R. 688.

(*q*) *Hancock v. Podmore*, 1 B. & Ad. 265, *per* Bayley, J.; accord. The following form is taken from Serjt. Williams' note in Sir E. V. Williams' edition, 1 Wms. Saund. 608, 609, for entering up judgment on the two issues of *non assumpsit* by the testator and of *plene administravit* by the defendant, to which the plaintiff replied that the defendant had assets since the commencement of the suit, where the jury find the first issue for the plaintiff, and, on the second issue, that the defendant has assets to satisfy only *part* of the debt: "As to the first issue between the said parties within joined, [the jurors] upon their oath do say, that the within-named William Clarke (the testator), in his lifetime did undertake and promise in manner and form as the said Francis hath above thereof complained against her the said defendant Mary (the executrix), and they assess the damages of the said Francis by reason of the not performing of the said promises and undertakings, over and above his costs and charges by him about his suit in this behalf expended, to 80*l.*, and for those costs and charges to 40*s.* And as to the last issue between the said parties within joined, the jurors aforesaid upon their oath aforesaid say, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, and since had goods and chattels which were of the said William at the time of his death in her hands to be administered to the value of 40*l.*, parcel of the said damages above assessed, wherewith she the said Mary might have satisfied the said Francis 40*l.*, parcel of the said damages; and as to 40*l.* residue of the said damages, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, or ever since, had not any other goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, wherewith she could have satisfied the said Francis the said 40*l.*, residue of the said damages so assessed as aforesaid. Therefore it is considered that the said Francis do recover against the said Mary the said 40*l.* by the said jury in form aforesaid found, parcel of the said damages of 80*l.* above assessed, together with his costs and charges by the said jury in form aforesaid assessed, and also 35*l.* for his costs and charges of increase by the said Court of our said lord the King here adjudged to the said Francis with his assent, which said damages, costs, and charges, in the whole amount to 77*l.*, to be levied of the goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, if she hath so much in her hands to be administered, and if not, then the said costs and charges, parcel of the damages last mentioned, amounting to 37*l.*, to be levied of the proper goods and chattels of the said Mary, and that, &c., &c., and that the said Francis do recover the said 40*l.* residue of the said

When several executors plead *plene administravit severally* by several attorneys, and the jury find that one of them only has assets, judgment shall be given against him only and the rest shall go quit (*r*). So too in *Parsons v. Hancock* (*s*), where in an action against several executors they all pleaded *jointly* that they had fully administered, &c., and the plaintiff proved assets in the hands of some only of the defendants, Parke, J., directed the jury to find a verdict for the plaintiff against the latter, and, as to the other executors, to find a verdict for the defendants (*t*).

judgment upon *plene administravit*, when one only of several executors is found to have assets:

It will appear, on referring to the description above given of the proper mode of entering judgment against executors and administrators (*u*), that, when defendants, they have no privilege as to costs; but, on the contrary, are liable to pay them *de bonis propriis* if there are no assets (*x*). The liability as well as the right to costs in the case of executors and administrators is governed, as in the case of ordinary litigants, by the provisions of R. S. C. 1883, Ord. LXV. (*y*).

executor's liability and right to costs as defendant:

In an action against an executor or administrator, if the defendant pleads *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment immediately of assets *quando acciderint*, or as it is sometimes called, judgment of assets *in futuro* (*z*). But if the plaintiff take issue on the general or special plea of *plene administravit*, and it be found against him, he could not under the former practice have judgment of assets *quando*, &c. (*a*).

judgment of assets *in futuro*:

damages in form aforesaid assessed, to be levied of the goods and chattels which were of the said William at the time of his death, or which since the pleading of the said second plea of the said Mary, have come or at any time hereafter shall come, to the hands of the said Mary, to be administered. And the said Mary in mercy," &c.

(*r*) *Bellew v. Juchleden*, 1 Roll. Abr. 929 (B.), pl. 5.

(*s*) 1 Mood. & Malk. 330.

(*t*) See also the remarks of the same learned judge in *Cousins v. Paddon*, 2 Crompt. M. & R. 558.

(*u*) *Ante*, p. 1575.

(*x*) See *Marshall v. Willder*, 9 B. & C. 655, 658.

(*y*) See *ante*, pp. 1534.

(*z*) *Mary Shipley's Case*, 8 Co. 134, *a*; *Noell v. Nelson*, 2 Saund. 226; *Parker v. Dee*, 3 Swanst. 532, note to *Drewry v. Thacker*. See the form of such judgment, 1 Saund. 216, 217.

(*a*) 1 Roll. Abr. 929 (B.), pl. 2; 2 Saund. 217, note (1) to *Noell v. Nelson*; *Lucas v. Jenner*, 2 Dowl. 64, *per* Bayley, B. But see *Hindsley v. Russell*, 12 East, 232. The same consequence does not seem to follow where *plene administravit* is ill pleaded: *Harris v. Goodwyn*, 2 M. & Gr. 414, 415, *per* Tindal, C. J.

By taking judgment of assets *quando* the plaintiff admits that the defendant has fully administered to that time (b): And accordingly, the terms of the judgment are that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor. And in debt or *scire facias*, on this judgment proof of the executor's receiving assets was always at the trial confined to a period subsequent to the judgment (c). And it is right that such be the rule at law; for if a creditor was permitted to litigate a second time that which has been once settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation (d).

costs on
judgment of
assets in
futuro.

When an executor or administrator pleads *plene administravit*, or judgments, &c., outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, &c., the executor or administrator is not liable to costs *de bonis propriis* (e): nor does he seem liable thereto, when he pleads *plene administravit præter*, and the plaintiff takes judgment of the assets admitted in part, and for the residue, of assets *quando*, &c. (f). But it would seem that though an executor or administrator, in such case, is not personally liable to pay costs, yet that judgment may be well entered for them, to be recovered *de bonis testatoris, quando acciderint* (g).

Proceedings
on judgment
against exe-
cutor *de*
bonis
testatoris;
by *feri*
facias:

Formerly there were two modes of enforcing a judgment obtained against an executor *de bonis testatoris*: 1st, by *feri facias* (h), or *scire fieri* inquiry; 2nd, by an action of debt on the judgment, suggesting a *devastavit*.

First, as to the proceeding by *feri facias* or *scire fieri* inquiry: If the sheriff returned, as he might do if he pleased, not only *nulla bona* but also a *devastavit*, to a *feri facias de*

(b) 2 Saund. 219, note (2); *Parker v. Dee*, 3 Swanst. 532, note to *Drewry v. Thacker*.

(c) *Taylor v. Holman*, Bull. N. P. 169; 2 Saund. 219, a, note (2).

(d) *Mara v. Quin*, 6 T. R. 1; 2 Saund. 219, a, note (2).

(e) 1 Saund. 336, b, note; Tidd, 980, 9th edit.

(f) Tidd, 980, 9th edit.

(g) *De Tastet v. Andrade*, 1 Chitt. Rep. 629, 630, *in notis*; *Cox v. Peacock*, 4 Dowl. 134.

(h) He may also proceed to enforce his judgment by attachment of a debt due to the estate of the executor under R. S. O. Ord. XLV., and a Court of Equity would not restrain such proceedings, notwithstanding there has been a decree for the administration of the estate, if the judgment was obtained before the decree: *Fowler v. Roberts*, 2 Giff. 226.

bonis testatoris sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *feri facias de bonis propriis* (*i*). And it seems that the sheriff runs no risk by returning a *devastavit*; for the judgment, and no assets to be found, was sufficient evidence of a *devastavit*, in an action against him for a false return (*k*).

But if the sheriff returned *nulla bona* generally, without also returning *devastavit*, the ancient course was to issue a special writ, for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased: And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to show cause why the plaintiff should not have execution *de bonis propriis*, to which *scire facias* the defendant might appear and plead. Subsequently, for the sake of expedition, the inquiry and *scire facias* were made out in one writ, which was called a *scire fieri* inquiry; reciting the judgment, *feri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in Court at the return of the writ to show cause why the plaintiff ought not to have execution *de bonis propriis*: And the same notice of executing such writ was required as of a common writ of inquiry (*l*).

The most usual mode of proceeding has been by action of debt on the judgment suggesting a *devastavit*.

The executor could not plead *plene administravit* to the *scire fieri* inquiry; because the judgment against him was conclusive that he had assets to satisfy it (*m*). Neither could he, upon the taking of the inquisition, give in evidence the want of assets (*n*): And it should, therefore, seem, that the jury were bound, upon

(*i*) 1 Saund. 219, note (8), to *Wheatley v. Lane*. The *feri* inquiry is only for the security of the sheriff: *Rock v. Leighton*, 1 Salk. 310; Chitty's Archbold, 14th edit. 1126.

(*k*) *Rock v. Leighton*, cited 3 T. R. 692; S. C., 1 Salk. 310.

(*l*) Tidd, 1113, 1114, 9th edit. See the account of the establishment of this practice: 1 Saund. 219, *a*, note to *Wheatley v. Lane*.

(*m*) See *ante*, p. 1564.

(*n*) 1 Saund. 219, *d*.

the judgment being put in evidence, together with the *fi. fa.* and the return, to find a *devastavit*, as suggested in the writ, unless the executor could show that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*o*). Accordingly, in a case where the under-sheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the Court quashed the return and awarded a new *scire fieri* inquiry (*p*). However, the return of a *devastavit* was not conclusive, whether found by the inquisition, or returned by the sheriff; and therefore the executor might traverse it, by denying the *devastavit*, and taking issue on it (*q*). And upon the trial of such an issue he might show that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them (*r*).

by action of
debts suggest-
ing a *devas-
tavit*.

The action of debt on the judgment suggesting a *devastavit* was substituted in lieu of the proceeding by *scire fieri* inquiry (*s*). The foundation of this action is the judgment obtained against the executor: which, as there has been already occasion to show (*t*), is conclusive upon him to show that he has assets to satisfy such judgment. If, therefore, upon a *fieri facias de bonis testatoris*, on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand (or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a *devastavit*; and, therefore, it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis* (*u*).

This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi. fa.* first taken out upon the judgment (*x*). But the

(*o*) 1 Saund. 219, *d*; *Leonard v. Simpson*, 2 Bing. N. C. 179, 180.

(*p*) *Palmer v. Waller*, 1 Mees. & Wel. 689; *S. C.*, 5 Dowl. 315.

(*q*) 1 Saund. 219, *c*; *Merchant v. Driver*, *ibid.* 306; *Blackmor v. Mercer*, 2 Saund. 402.

(*r*) See 1 Saund. 219, *c*; 2 Bing. N. C. 180, 181.

(*s*) *Berwick v. Andrews*, 2 Lord Raym. 974; 1 Saund. 219, *a*, note.

(*t*) *Ante*, p. 1564.

(*u*) 1 Saund. 219, *b*, note (8), to *Wheatley v. Lane*; *Blackmor v. Mercer*, 2 Saund. 403; *Erving v. Peters*, 3 T. R. 686; *Farr v. Newman*, 4 T. R. 637.

(*x*) *Wheatley v. Lane*, 1 Sid. 397; 1 Saund. 219, *c*, note.

usual course is, first to sue out a *feri facias* upon the judgment, and, upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ, and return, in the declaration or statement of claim; and, on the trial, the record of the judgment, the *feri facias*, and the return, will be sufficient evidence to prove the case (*y*).

In this form of action the judgment was *de bonis propriis* (*z*). The executor or administrator might plead that he did not waste, &c., in manner and form, &c., and under this plea he might give in evidence, that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*a*). But the executor or administrator could not plead *plene administravit*, or any other plea which put his defence upon want of assets: For such plea would be contrary to what was admitted by the judgment: And if the truth were, that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he was not permitted to say so afterwards (*b*). Again, if he had pleaded *plene administravit* to the original action, and the judgment was had upon a verdict finding that *he had* assets, he was equally concluded from saying that he had no assets (*c*). And, for the same reason, he could not *give in evidence* the want of assets on the trial of the *devastavit* (*d*).

If an executor allows judgment by default to go against him, this is an admission of assets, but it does not justify a judgment *de bonis propriis* against him, for no such judgment can be entered unless a *devastavit* is proved. But after a return of *nulla bona testatoris* the plaintiff may bring a second action for the debt, for such a return is, in the absence of an answer, proof of a *devastavit* and the defendant is estopped by the first judgment from denying assets. The judgment in the second action, if the defendant again makes default will then be *de bonis testatoris et si non de bonis propriis* as to both debt and costs (*e*).

(*y*) *Challoner v. Challoner*, cited in *Skelton v. Hawling*, 1 Wils. 259; *Erving v. Peters*, 3 T. R. 685; 1 Saund. 219, *c*; S. P. where an irregular *testatum fi. fa.* had been issued and returned *nulla bona*: *Leonard v. Simpson*, 2 Bing. N. C. 176.

(*z*) *Warren v. Consett*, 2 Lord Raym. 1502.

(*a*) 1 Saund. 219, *c*, note, *ante*, p. 1580.

(*b*) 1 Saund. 219, *c*, note.

(*c*) *Erving v. Peters*, 3 T. R. 693.

(*d*) *Rock v. Leighton*, 1 Salk. 310.

(*e*) *Rock v. Leighton*, *supra*; *Leonard v. Simpson*, *supra*; *Tiomp-*

If a man obtained judgment against an executor, and died, his executor might bring an action upon the judgment against the executor, suggesting a *devastavit*: for such an action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted (*f*). So, on the other hand, if a judgment was had against an executor, who afterwards died, an action might, after the stat. 30 Car. II. c. 7 (*g*), be brought against his executor or administrator, upon the judgment, suggesting a *devastavit* by the first executor, and the judgment was as conclusive upon the representative of the executor, as it was upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, was brought against *his* executor or administrator, he could not have pleaded that the first executor fully administered the goods of the first testator, or any other plea, purporting that he (that is, the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done (*h*). For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, by virtue of the statute, made his *personal estate* liable in the hands of his executor or administrator (*i*). But the executor or administrator of the executor might plead, that he, the defendant, had fully administered all the estate of his own testator or intestate (*j*). Moreover the judgment in the action, when brought against the executor or administrator of the executor, against whom the judgment was obtained, was *de bonis testatoris*, or *intestati* (*k*).

Remedy on judgment obtained against the testator.

But no action of debt suggesting a *devastavit* by the executor lay against him upon a judgment obtained *against his testator*: because that was no admission of assets by the executor: and, therefore, in such cases, it was necessary to revive the judgment against the executor, to make him a party to it (*l*).

If the testator died after execution was sued out, the writ

son v. Clarke, 17 T. L. R. 455; *Lacons v. Warmoll*, [1907] 2 K. B. at p. 360. See *ante*, p. 1575.

(*f*) *Berwick v. Andrews*, 2 Lord Raym. 971; *S. C.*, 1 Salk. 314; *ante*, p. 609.

(*g*) See *ante*, p. 1340.

(*h*) *Skelton v. Hawling*, 1 Wils. 258.

(*i*) 1 Saund. 219, *d*, note.

(*j*) 1 Saund. 219, *e*, note. See *post*, p. 1583.

(*k*) 1 Saund. 219, *f*, note.

(*l*) *Crosby v. Geering*, cited in *Berwick v. Andrews*, 2 Lord Raym. 972.

could be still executed on his goods in the hands of his executors, without taking any further proceeding (*m*).

But generally speaking, if a defendant died after a final judgment against him, and before execution, the plaintiff could not have execution without reviving the judgment against the personal representative of the defendant (*n*). If, indeed, there were two or more defendants, and one of them died after judgment, but before execution, the plaintiff was not put to revive the judgment against the personal representative of the deceased, but execution might be had without it against the survivors, within a year (*o*). But the execution in such case was taken out in the joint names of all the defendants, otherwise it would not have been warranted by the judgment (*p*).

Before the Common Law Procedure Act, 1852, the judgment was revived by a writ of *scire facias*, which stated, that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it called on the defendant to show why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered (*q*).

But, under that statute the plaintiff might either sue out a writ of revivor in the form given by the Act, or apply to the Court or a Judge for leave to enter a suggestion on the roll, that he was entitled to have execution thereon: And the Act, in the 129th and two following sections, prescribes the mode of proceeding, and course to be pursued in respect of each of these substitutes for a *scire facias*.

With respect to the pleas which an executor or administrator might have pleaded in his defence, he could, it seems, have pleaded *plene administravit*, or a plea that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much, if any did, and show how he administered them (*r*).

(*m*) 1 Chitty's Archb. 810, 14th edit.

(*n*) 2 Saund. 6, note (1) to *Jeffreson v. Morton*.

(*o*) Tidd, 1120, 9th edit.

(*p*) *Ibid*.

(*q*) Tidd, 1119, 9th edit. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not have been expressly averred: *Moorfoot v. Chivers*, 1 Stra. 631; *S. C.*, 2 Lord Raym. 1395; *Tidd, ubi supra*.

(*r*) *Newton v. Richards*, 1 Salk. 296; 4 Mod. 296; 1 Lord Raym. 3, 4; 2 Saund. 72, *dd*, note (4); *Hickey v. Hayter*, 6 T. R. 384.

After the plaintiff had obtained judgment and execution against the executor, he might bring an action of debt in the *debet* and *detinet* on the latter judgment against the executor, suggesting a *devastavit*: And in such action the judgment was conclusive against the defendant, that he had assets: Therefore he could not plead *plene administravit*; and the judgment was *de bonis propriis* (s).

Since the passing of the Judicature Act it would seem that the judgment creditor, on a judgment against the testator, would have to apply for leave to issue execution under R. S. C. 1883, Ord. XLII. r. 23, and if the executor deny on the hearing of the summons that he has in his hands assets of the testator against which execution ought to go, the Judge may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and that the issue would be so framed as to allow the executor to raise any of the defences which he formerly could have raised on the writ of *scire facias*, or under the Common Law Procedure Act. There seems to be nothing in the Order which enables the creditor to raise an issue of *devastavit* under the proceedings directed by it.

Leave given under Ord. XLII. r. 23, to issue execution against the executor of a deceased judgment debtor does not operate as a judgment against the executor; it merely dispenses with the necessity of recovering judgment against him, and consequently does not satisfy the requirements of sects. 14 and 15 of 1 & 2 Vict. c. 110 (t).

Proceedings
on judgment
of assets in
futuro.

If a judgment of assets *quando acciderint* has been entered against an executor and administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant.

If assets come to the hands of the executor or administrator the plaintiff can apply for leave to issue execution under clause (c) of Ord. XLII. r. 23, above mentioned, which provides that where a party is entitled to execution upon a judgment of assets *in futuro* the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly: And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an

(s) *Hope v. Bague*, 3 East, 2.

(t) *Stewart v. Rhodes*, [1900] 1 Ch. 386; *ante*, pp. 662, note (m), 1354.

order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried.

Although the old practice has been superseded, under which the plaintiff proceeded by an action of debt upon the judgment, or by the writ of revivor, substituted by the C. L. P. Act, 1852, in lieu of a *scire facias*, yet it seems convenient to retain in this Edition the statement of the pleadings and necessary allegations under a *scire facias*, because such statement will furnish a guide as to what the judgment creditor must allege in his affidavit to entitle him to leave to issue execution under Ord. XLII. r. 23, and as to the form of the issue, should one be directed.

If the judgment was in the ordinary form, it was held necessary to state, in the writ of *scire facias*, that the assets came to the executor's hands *after* the judgment; for that the *scire facias* must pursue the terms of the judgment, which, in this case, were, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor: Therefore, where a *scire facias*, on such a judgment as this, of assets *quando acciderint*, stated that divers goods, &c., of the testator, sufficient to pay, &c., had come to, and were in the hands of the defendant to be administered, &c., without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c., the defendant pleaded, that *after the plaintiff's judgment*, no goods, &c., of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied, that divers goods, &c., had come to the defendant's hands, without adding, *since the judgment*; and on demurrer it was adjudged, that the *scire facias* was wrong, for want of the words "*after the judgment*:" For when an executor pleads *plene administravit*, the plaintiff may either deny, or admit that allegation: if he admits it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time (*u*).

(*u*) *Taylor v. Holman*, Bull. N. P. 169; 2 Saund. 219, *a*, note.

Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro* (x).

Remedies
against
executor of
executor.

For those causes of action which are sustainable against an executor in respect of the acts of the deceased, the plaintiff, on the death of a *sole* executor, may maintain the action against his executor: for the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (y). But, on the death of an executor, without appointing an executor of his own, or on the death of an administrator, the actions above mentioned must be brought against the administrator *de bonis non* (z).

With respect to the remedies for the *devastavit* of an executor or administrator, in the event of his death, it has already appeared (a) that, at common law, no executor or administrator was answerable for a *devastavit* by his testator or intestate: But, by the statutes 30 Car. II. c. 7, and 4 & 5 Will. & Mary, c. 24, s. 12, this defect has been remedied (b). So that, since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator, suggesting a *devastavit* by the first executor (c). And in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor, or administrator of such executor, suggesting a *devastavit* by the former executor. And the judgment must be *de bonis testatoris* (d).

Executor is
within the

By 51 & 52 Vict. c. 43, s. 95, an executor or administrator

(x) *Perryman v. Westwood*, cited in 1 Ventr. 95, and 1 Sid. 448.

(y) See *ante*, p. 174.

(z) See *ante*, p. 385 *et seq.*

(a) *Ante*, p. 1340.

(b) *Ante*, p. 1340. See the observations of Wood, V.-C., on these statutes in *Thorne v. Kerr*, 2 Kay & J. 63, 64. But the statute of 30 Car. II. c. 7, was held not to make an executor of an executrix *de son tort* liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled: *Wilson v. Hodson*, L. R. 7 Ex. 84, *ante*, p. 182, n. (j).

(c) See *ante*, p. 1580.

(d) 1 Saund. 219, e, f, note (8) to *Wheatley v. Lane*; *Coward v. Gregory*, L. R. 2 C. P. 153, 137.

may, sue or be sued in the County Court as if he were a party in his own right (e). County Court Act.

Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term (f). And the executor or administrator cannot plead *plene administravit* in bar to the avowry (g). So the distress may be taken by virtue of the stat. 8 Ann. c. 14, ss. 6 and 7, within six months after the determination of the tenancy, if the executor or administrator continues in possession (h). Remedy against executor by distress.

The death of either party is the countermand of a warrant of attorney to confess judgment (i); and, therefore, upon a motion to enter up judgment, if it appears that the defendant is dead, the Court will not grant the motion (k). So a *cognovit actionem* is revoked by the death of the party (l). Judgment cannot be entered on warrant of attorney or cognovit given by testator.

There has already been occasion to consider, in cases of arbitration, the effect of the death of either party, before or after the making of the award (m). It may here be observed, that the Court will not grant an attachment against an executor for the non-performance of an award, which was made under a reference by rule of Court entered into by the testator (n). Proceeding against executor on reference to arbitration by testator.

If a solicitor's bill against the testator should be referred to taxation after his death, questions of difficulty may arise as to the effect of the order for payment by the executor or administrator of the sum found due. In cases where justice requires Liability of executor to pay an attorney's bill after taxation.

(e) See *ante*, p. 1517.

(f) Wentw. Off. Ex. 291, 14th edit.; *Braithwaite v. Cooksey*, 1 H. Black. 465.

(g) Wentw. *ubi supra*.

(h) *Braithwaite v. Cooksey*, 1 H. Black. 465.

(i) See *ante*, p. 675; Tidd, 551, 9th edit.

(k) Tidd, 561, 9th edit.; *Harden v. Forsyth*, 1 Q. B. 177. It will make no difference that the defendant, by the memorandum on the warrant, agreed for himself and his executor that it should be lawful to enter up judgment at any time, notwithstanding he should be dead: *Heath v. Brindley*, 2 A. & E. 365.

(l) See Chitty's Archbold, 14th edit. 1297 *et seq.* as to the law and practice relating to judgments by cognovit or upon a warrant of attorney; and see also Practice Masters' Rules, (18) and (25).

(m) *Ante*, p. 676.

(n) *Newton v. Walker*, Willes, 315.

that the order for taxation should be made, and it nevertheless appears probable that, by reason of deficiency of assets, or the like, payment of the amount found to be due ought not to be made without further investigation, the Court or Judge, by whom the order for taxation is made, ought, it would seem, to abstain from adding the usual order for payment or the delivery up of deeds (*o*).

Proceedings
against
executors of
parties to
bills of
exchange.

If, when a bill of exchange becomes due, and is dishonoured, the drawer or indorser is dead, notice of the dishonour ought to be given to his personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*p*). Where the drawee, acceptor, or maker is dead, and no place of payment is specified, the bill or note must be presented to his personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*q*). Where the bill is made payable and is presented at the proper place, and after the exercise of reasonable diligence no persons authorized to pay or refuse payment can be found there, it is not necessary to present it also at the house of the executor or administrator (*r*). In case there is no representative, the holder should demand payment at the house of the deceased (*s*). If the holder of a bill made the acceptor his executor, and died, this, which at law (*t*) operated as a discharge of the debt, by making the debtor

(*o*) See *Re Dalby*, 8 Beav. 469.

(*p*) Byles on Bills, 17th edit. 279; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (9); Chalmers on Bills of Exchange, 7th edit. p. 175. In America it has been held that where the indorser of a note is dead at the time it becomes due, and there are executors or administrators at that time known to the holder, notice must be given to them; but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators, subsequently becoming such: *Merchant's Bank v. Birch*, 17 Johns. R. 25; Bayley, 418, Amer. edit.

(*q*) Byles on Bills, 17th edit. 230; Chalmers on Bills of Exchange, 7th edit. p. 161; 45 & 46 Vict. c. 61, s. 45 (7).

(*r*) *Philpot v. Briant*, 3 Carr. & P. 244. Cf. 45 & 46 Vict. c. 61, s. 45 (5).

(*s*) Roscoe on Bills, 147; Chalmers, 7th edit. 176, *n*.

(*t*) Chitty on Bills, 11th edit. p. 153. The appointment of a debtor as executor to his creditor did not operate as a discharge of the debtor in equity, but it was considered that the debt had been paid to the debtor executor by himself, and he was held accountable accordingly. The equity rule will now prevail. By sect. 61 of 45 & 46 Vict. c. 61, when the acceptor of a bill is or becomes the holder of it at or after its maturity in his own right, the bill is discharged, but this section does not seem to affect the matter, since the executor-acceptor does not become the holder in his own right.

executor (*u*) operated also as a discharge of the drawer and prior indorsers (*x*).

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court of Exchequer refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution (*y*).

Effect of
injunction.

A verdict against a testator or intestate may be produced in evidence against his executor or administrator, and binds him (*z*).

Verdict
against
testator
evidence
against
executor.

In an action against executors for money had and received by their testator, the plaintiff relied on an admission of the testator contained in his Will: Notice had been given to the defendants to produce the probate, but no evidence was given to prove that the probate was in their possession: An officer of the Spiritual Court produced a document purporting to be the original Will of the deceased, bearing the seal of the Court, and also an indorsement, made by the officer of the Spiritual Court, purporting that probate had been granted to the defendants on that instrument as of the Will of the deceased, and that they had made oath of the value of the effects accordingly: It was objected, on the part of the defendant, that the Will should have been proved by one of the subscribing witnesses, and further, that probate not being produced, the next best evidence was the act of the Spiritual Court, which was not produced: But it was held that the document produced must be taken as proving that the defendants had obtained probate of the paper, and had therefore treated it as the Will of their testator, and consequently that it ought to be received against them, at all events, as secondary, if not as original, evidence (*a*).

What is
good
secondary
evidence of
the contents
of the Will.

(*u*) See *ante*, p. 1053.

(*x*) Chitty on Bills, 8th edit. 569.

(*y*) *Davis v. Salter*, 2 Cr. & J. 466.

(*z*) *R. v. Hebden*, Andr. 389; Rose. Ev. 100, 2nd edit. See *Smith v. Smith*, 3 Bing. N. C. 29, as to the admissibility of the declarations of the deceased, as evidence against the executor or administrator. See also *Spiers v. Morris*, 9 Bing. 687, as to the admissibility of entries made by a deceased executor against his interest.

(*a*) *Gorton v. Dyson*, 1 Brod. & Bingh. 219. See *ante*, p. 1556. See also pp. 1512, 1513.

CHAPTER THE SECOND.

REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN EQUITY.

What suits in equity may be brought against executors, &c.

Executors and administrators considered in equity as trustees.

AN executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death (*a*).

Again, executors and administrators are for most purposes considered, in Courts of Equity, as trustees (*b*); for instance, they are held in equity to be personally liable for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from their office (*c*): Upon this principle, those Courts have exercised a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the Will, or in case of intestacy, according to the Statute of Distributions (*d*).

(*a*) Toller, 479.

(*b*) Cf. the definitions of "trust" and "trustee" in sect. 50 of the Trustee Act, 1893.

(*c*) *Re Marsden*, 26 C. D. 783, 789.

(*d*) *Adair v. Shaw*, 1 Scho. & L. 262. An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own (see the Executors Act, 1830, and *Re Lacy*, [1899] 2 Ch. 149), but such a trust does not take a case out of sect. 8 of the Statute of Limitations, 37 & 38 Vict. c. 57. An executor cannot be deprived of the benefit of the statute by its being shown that he is a trustee; he must be shown to be an express trustee: *per* Lindley, L. J., *Re Jane Davis*, [1891] 3 Ch. at p. 124; *Re Mackay*, [1906] 1 Ch. 25. Where reversionary legacies were bequeathed and made payable out of a residuary trust fund on the death of a tenant for life, and subject to payment of the legacies the trust fund was to be held for the residuary legatee absolutely, it was held that the legacies were not trust legacies within the meaning of the above section: *Re Barker*, [1892] 2 Ch. 491. But where a testatrix bequeathed the residue of her money to an infant, it was held that, the estate being cleared and the residue ascertained, the executor would hold the residue in trust for the infant within the meaning of sect. 43 of the Conveyancing Act, 1881, and was entitled to apply the income for maintenance: *Re Smith*, 42 C. D. 302; and

Hence a Court of Equity will make an order for payment of a personal legacy or for the distribution of an intestate's personal estate (*e*): and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them (*f*): And, even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court directed an account against him (*g*). So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed in the Spiritual Court (*h*). And a bill was, in the case of *Dulwich College v. Johnson* (*i*), held on demurrer to be properly brought for the discovery of assets, before the Will was proved, during the litigation thereof in the Probate Court (*k*).

Instances of
this:

A single creditor may sue in equity for his demand out of the personal assets, and may, as at law, gain a preference, by the judgment in his favour, over other creditors in the same degree, who may not have used equal diligence (*l*). But a person entitled to a share of a sum of money, which is due as a debt from the testator, must sue on behalf of himself and all other parties interested in the debt, or make those other persons parties to the suit (*m*).

Right of
individual
creditors.

But where the only creditor has obtained in an administration action a personal order against the executor for payment of his certified debt he cannot subsequently pursue any remedy

see *Re Adams*, 51 Sol. Jo. 113; [1906] W. N. 220. See further as to when an executor is *functus officio*, and becomes clothed with the character of a trustee: *Re Timmis*, [1902] 1 Ch. 176; *Solomon v. Attenborough*, [1912] 1 Ch. 451, 458; [1913] A. C. 76. There is no authority for saying that once the debts are paid the residue is to be held upon an express trust: *Re Mackay*, [1906] 1 Ch. 25.

(*e*) Com. Dig. Chancery (3 D. 1); *Howard v. Howard*, 1 Vern. 134.

(*f*) In *Brooks v. Oliver*, Ambl. 406, the acting executor, to whom the produce of an estate in Antigua, belonging to an infant, was assigned, was directed to account annually by affidavit.

(*g*) *Gibbons v. Dawley*, 2 Chanc. Cas. 198.

(*h*) *Bissell v. Axtell*, 2 Vern. 47.

(*i*) 2 Vern. 49.

(*k*) See also *Phipps v. Steward*, 1 Atk. 285. See, however, the more modern practice of appointing a receiver pending grant of probate, *ante*, p. 408; *Re Wenge*, [1911] W. N. 129.

(*l*) Mitf. Pl. 5th edit. 193. See *Att.-Gen. v. Cornthwaite*, 2 Cox, 44; *Re Barrett*, 43 O. D. 70.

(*m*) *Alexander v. Mullins*, 2 Russ. & M. 568. See *Re James*, [1911] 2 Ch. 318.

depending on the continued existence of the fiduciary relation (*n*).

The right of a creditor to sue on his own behalf and on behalf of the other creditors, where he desires to have the real estate of his deceased debtor administered, will be found discussed later in the chapter (*o*).

Executor,
&c., liable to
be sued for
testator's
debts from
moment of
death.

Suit against
executor by
testator's
debtor to re-
strain action
on ground of
intended
misappropri-
ation of
the fund not
maintain-
able:

Parties:

Although an executor has a year allowed him in equity to pay legacies, that does not extend to debts, but he is liable to be sued for debts the moment after the testator's death (*p*).

A debtor to a testator cannot maintain a suit against the personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative to recover the debt, on the ground that the debt has been appropriated by the testator for a particular purpose, and that the personal representative intends to apply it for purposes not warranted by the Will (*q*).

The general rule is, that if there are several executors or administrators, they must all be sued, though some of them be infants (*r*). Therefore, a person cannot, either as creditor or residuary legatee, maintain a suit in equity against one co-executor only (*s*). But it is only necessary to sue so many of the executors or administrators as have acted: this is the same at law (*t*). Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find

(*n*) *Re Thomas*, [1912] 2 Ch. 348.

(*o*) See *post*, p. 1623.

(*p*) *Nicholls v. Judson*, 2 Atk. 301.

(*q*) *Darthez v. Winter*, 2 Sim. & Stu. 536.

(*r*) 16 Vin. Abr. 251, tit. Party (B.), pl. 20. An infant may be appointed executor at any age, but he cannot act as sole executor till twenty-one: *ante*, pp. 153, 154. An infant who has proved the Will is bound by all things which he doth according to the office and duty of an executor, but things which he doth against the office of an executor should not bind him, forasmuch as he is within age; and therefore a release by an infant executor does not bar him: *Russell's Case*, 5 Co. Rep. 27a. But though he might administer, yet he could not till he was of full age commit a *devastavit* (*Whitmore v. Weld*, 1 Vern. 328), and he is not liable to account for his receipts during the period of his infancy: *Hindmarsh v. Southgate*, 3 Russ. 324. Nor is he liable if he waste assets which come to him as executor *de son tort*: *Stott v. Meanock*, 31 L. J. Ch. 746.

(*s*) *Scurry v. Morse*, 9 Mod. 89. As to adding defendants, see R. S. C., Ord. XVI. r. 11.

(*t*) *Ante*, p. 1551. And much more therefore in a Court of Equity: *Brown v. Pittman*, Gilb. Eq. Rep. 75; *Strickland v. Strickland*, 12 Sim. 463; *Dyson v. Morris*, 1 Hare, 413.

him, it was held that it was not necessary to make him a party (u).

Although one of two executors or trustees may sue the other executor or trustee without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties (v).

When *cestuis que trust* are necessary parties.

If during an action the defendant dies, the action can be continued against his personal representative, and it makes no difference in this respect whether the defendant dies before or after decree (x).

Defendant dying pending action.

As has been pointed out in an earlier part of this Work (y), some causes of action do not continue after the death of the wrongdoer, and, consequently, do not survive against his executor, but the maxim *actio personalis moritur cum personâ* does not apply to remedies for breaches of contract, express or implied, nor does it apply to those cases of tort, where, by means of a wrongful act done by a deceased person, property or the proceeds or value of property have been appropriated by the deceased person and added to his estate (z). Nor will the maxim prevent a claim by a person standing in a fiduciary relation to the deceased, where the latter has abused his position, the act in such a case being a breach of a *quasi* contract (a). The rule at common law was that executors could not be sued for a wrong committed by their testator for which only unliquidated damages were recoverable; and the rule in equity is the same (b).

Actio personalis moritur cum personâ.

By R. S. C. 1883, Ord. XVI. r. 46, it is provided that "if in any cause, matter, or other proceedings it shall appear to the Court or Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint

Where no legal personal representative the Court may appoint or dispense with.

(u) *Heath v. Percival*, 1 P. Wms. 684. An administrator, though insolvent, must be made a party to a bill for a discovery of assets: *Ashurst v. Eyre*, 2 Atk. 51. So although he actually releases, he must be a party to the suit: *Smithby v. Hinton*, 1 Vern. 31.

(v) *Jesse v. Bennett*, 6 De G. M. & G. 609.

(x) For the practice where a defendant dies, see R. S. C. 1883, Ord. XVII.

(y) *Ante*, p. 608. See also chapter on the "Remedies for Executors in Equity," *ante*, p. 1518.

(z) *Phillips v. Homfray*, 24 C. D. 439; *Re Duncan*, [1899] 1 Ch. 387.

(a) *Concha v. Murrieta*, *De Mora v. Concha*, 40 C. D. 543.

(b) *Kirk v. Todd*, 21 C. D. 484, 488; *Re Duncan*, *ubi supra*.

some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons (if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or other proceeding."

Cases to which rule does not apply.

The section of the Chancery Procedure Act (*c*) from which this rule was taken, was held by Lord Romilly (*d*) not to apply to the three following cases: first, where the estate of the deceased person is that which is being administered in the suit; secondly, where the interest of the deceased person is adverse to that of the plaintiff; thirdly, where the representative of the deceased person has active duties to perform.

Kindersley, V.-C., in the case of *Silver v. Stein* (*e*) held that the section only applied to those cases where a certain individual who, when living, was interested in the suit, and was made a party had died, but this ruling does not appear to have been followed in later cases (*f*).

Sole plaintiff dying insolvent.

In one case (*g*), where a sole plaintiff died insolvent, the Court, on the application of the sole defendant, appointed a person to represent the deceased plaintiff's estate, so as to enable the defendant to have an opportunity of moving to dismiss the action for want of due prosecution (*h*).

A creditor cannot sue a person named as executor in a Will unless he has either administered or obtained a grant of probate (*i*).

Protection of the estate pending grant of

But the Court will, before probate or letters of administration of the estate have been granted, interfere on behalf of a creditor or beneficiary in case of need to protect the estate of the

(*c*) 15 & 16 Vict. c. 86, s. 44.

(*d*) *Moore v. Morris*, L. R. 13 Eq. 139, 140. See also *Groves v. Levi*, 9 Hare, App. xlvii., and cases cited on same page.

(*e*) 1 Drew. 295.

(*f*) See *Chaffers v. Headlam*, 9 Hare, App. xlvi.; *Swallow v. Binns*, *ibid.* xlvii.; *Re Peppitt's Estate*, 4 C. D. 230.

(*g*) *Wingrove v. Thompson*, 11 C. D. 419.

(*h*) For instances of the exercise of this jurisdiction, see *Mortimer v. Mortimer*, 11 W. R. 740; *Crosley v. City of Glasgow Assurance Co.*, 4 C. D. 427; *Webster v. British Empire Co.*, 15 C. D. 139; *Curtius v. Canadian Fire and Life Insurance Co.*, 19 C. D. 534.

(*i*) *Mohamidu Hadjar v. Pichay*, (P. C.) [1894] A. C. 437.

deceased by the appointment of a receiver or manager or both (j).

probate or administration.

The subject of the appointment of a receiver, during a litigation in the Probate Division for probate or administration, has been already considered (k), and mention made of the provisions of the Probate Act, relative to the appointment of receivers of real estate *pendente lite* (l).

Receiver pending litigation in the Probate Division.

It has been held that an application for the appointment of a receiver pending probate should not be made to the Chancery Division except there are special circumstances, such as danger to assets, requiring the appointment (m), and that such applications being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged (n). But the practice now is for the Chancery Division to entertain these applications in administration actions where by the writ there is a claim for the appointment of a receiver pending the grant of probate or letters of administration (o).

The addition of a claim for administration of the estate to a claim for its protection until the appointment of a legal personal representative has been held to be irregular (p).

Claim for protection and administration.

The fact that the executor declines to admit assets, and that consequently, if a receiver be not appointed, the executor may prefer one creditor to another, is not sufficient ground for application to the Court (q). The Court will not appoint a receiver merely for the purpose of depriving him of his right of preference (r), nor will it interfere with an executor's right of retainer by appointing a receiver in a creditor's administration action, merely because he will probably exercise his right

When, after grant of probate or administration, application can be made to Chancery Division.

(j) *Steer v. Steer*, 2 Dr. & Sm. 311; *Nothard v. Proctor*, 1 C. D. 4; *Blackett v. Blackett*, 24 L. T. 276.

(k) *Ante*, pp. 408, 409.

(l) *Ante*, p. 405.

(m) *Re Henderson*, 2 Times Rep. 322; *Re Pryse*, [1904] P. 301; but see *Re Oakes*, [1917] 1 Ch. 230, where there was no jeopardy.

(n) *Re Henderson*, *supra*; *Re Parker*, 54 L. J. Ch. 694; *In the goods of Moore*, 13 P. D. 36. A receiver, however, cannot be appointed before a writ has been issued. Caveat proceedings, which terminate by appearance, do not constitute a *lis pendens* or furnish any mode of approaching the Court: *Salter v. Salter*, [1896] P. 291; and see *post*, Pt. v. Bk. II. Ch. III.

(o) *Re Wenge*, [1911] W. N. 129; *Re Oakes*, *supra*.

(p) *Overington v. Ward*, 34 Beav. 175; *Rawlings v. Lambert*, 1 J. & H. 458; but see last note.

(q) *Phillips v. Jones*, 28 Sol. J. 360.

(r) *Per Chitty*, L. J., in *Re Stevens*, [1898] 1 Ch. at pp. 173, 174.

to the prejudice of the general body of creditors, nor unless it is shown that the assets are being wasted (*s*). The Court will, however, make an administration decree in order to prevent an undue preference (*t*).

When a receiver is appointed against an executor, &c.

If, in the case of an executor or administrator, any misconduct, waste, or improper disposition of the assets is shown, or if he is out of the jurisdiction, the Chancery Division will instantly interfere and appoint a receiver (*u*). So the bankruptcy of a sole executor and trustee is a ground for such an appointment (*x*). But the administration is not to be taken from the executor upon slight grounds, as, for instance, merely on the ground of his poverty (*y*), although a receiver has been appointed where the husband of an executrix was in bad circumstances (*z*).

Executors of receiver.

The Court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets (*a*).

Motion for payment of money into Court.

The Court will, as a rule, immediately upon admission of assets by an executor or administrator, order so much as he admits to have in his hands to be paid into Court: though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances (*b*). It seems, however, that this rule is not absolute, but that where a creditor

(*s*) *Re Wells*, 45 C. D. 569; *Re Stevens*, *supra*.

(*t*) See *ante*, p. 795 *et seq.*

(*u*) *Anon.*, 12 Ves. 5, by Sir Wm. Grant; *Middleton v. Dodswell*, 13 Ves. 268. See also *Havers v. Havers*, Barnard. Chanc. 24; *Richards v. Perkins*, 3 Y. & Coll. 299.

(*x*) *Re Johnson*, L. R. 1 Ch. 325. The fact of the assignees not being before the Court was held not a sufficient reason for refusing to appoint a receiver. Cf. *Re Hopkins*, 19 C. D. 61; and see *Bowen v. Phillips*, [1897] 1 Ch. 174; Dan. Ch. Pr. 8th edit. 1458.

(*y*) *Middleton v. Dodswell*, 13 Ves. 268. See *Smith v. Smith*, 2 Y. & Coll. 353; *Whitworth v. Whyddon*, 2 M. & G. 52. Mere poverty is not sufficient: *Hathornthwaite v. Russell*, 2 Atk. 126; *Anon.*, 12 Ves. 4; *Howard v. Papera*, 1 Mad. 142; *Manners v. Furze*, 11 Beav. 30, 31. See also Dan. Ch. Pr. 8th edit. 1458.

(*z*) *Taylor v. Allen*, 2 Atk. 213; *Scott v. Becher*, 4 Pri. 346.

(*a*) *Jenkins v. Briant*, 7 Sim. 171. The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to bring an action against the executor for an account. But this course may be avoided if the executor will consent to an order to pass the receiver's accounts and to pay the balance: Dan. Ch. Pr. 8th edit. 1495.

(*b*) *Strange v. Harris*, 3 Bro. C. C. 365; *Blake v. Blake*, 2 Scho. & Lef. 26; *Robertson v. Scott*, 14 L. T. 187.

is suing for his own debt only, or where the application is by persons interested in reversion subject to a tenancy for life, some reasonable ground such as danger to the fund ought to be made out (c).

The rule appears to have been limited by Lord Redesdale (d) to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding. But the rule appears to be more extensive, and any balance which is admitted to be in the executor's hands will as a general rule be ordered into Court, notwithstanding there are demands on it to which the executor is liable (e). Thus in *Yare v. Harrison* (f), an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the Court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the Court ordered the amount to be paid out to *the plaintiff in the action*, and not to the executor (g). However, now, after an administration order has been made, the Judge in whose Court the administration is pending has power, without any further consent, to order the transfer to him of any cause or matter pending in any other Court or Division, and brought by or against the executors or administrators as the case may be (h).

Former
limitation
of rule.

Where the executor admits himself to have been a debtor to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compellable to pay it into Court accordingly (i).

Admission of
assets in the
executor's
hands.

(c) Dan. Ch. Pr. 8th edit. 1516; *Reeve v. Goodwin*, 10 Jur. 1050; *Re Braithwaite*, 21 C. D. 121.

(d) *Blake v. Blake*, 2 Scho. & Lef. 26.

(e) *Betagh v. Concannon*, 2 Moll. 559; Dan. Ch. Pr. 8th edit. 1516. If an executor admits that all the testator's debts, &c. have been paid, the Court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue: *Dando v. Dando*, 1 Sim. 510. But see *Abby v. Gilford*, 11 Beav. 28.

(f) 2 Cox, 377.

(g) It having been suggested in this case, that the executor had incurred unnecessary costs, by defending the action, the question whether he should personally answer to the estate for the amount of such costs was reserved to the hearing.

(h) Ord. XLIX. r. 5. See *post*, p. 1626.

(i) *Mortlock v. Leathes*, 2 Meriv. 491; *Rothwell v. Rothwell*, 2 Sim.

In this case, the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realised in the hands of the executor (*k*).

The Court will only act on an admission.

The Court, in making an order of this kind, adheres strictly to the rule of acting on the executor's admission only: and will refuse to proceed upon its knowledge derived from any other source (*l*).

Practice of the Court on interlocutory motion.

The practice of the Court of Chancery originally was to order a defendant to pay money into Court upon an interlocutory motion only when he had by his answer admitted that the sum was in his hands. An admission that the sum in question was due from him to the plaintiff was not sufficient; he must have admitted that it was actually in his hands. The practice was afterwards extended to admissions made by a defendant in affidavits (*m*), and a still further extension was made by Sir G. Jessel, M. R., in *Freeman v. Cox* (*n*), by ordering a defendant to pay money upon an affidavit of the plaintiff, which the defendant had not answered, that he had a sum of money in his hands; but this practice ought not to be extended any further, and such orders ought to be made only when it is made out to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the plaintiff's demand (*o*). The defendant, however, should state, not merely that no part of the money is in his hands, but further, that it is not in his power or under his control (*p*). And it would seem that the defendant would not escape an order being made against him by stating that he paid the money away the day before to someone to whom he had no right to pay it, and who had no title to receive it (*q*).

Ord. LV. r. 3 (d) of R. S. C., which provides for an order

& Stu. 218; *Costeker v. Horrox*, 3 Younge & Coll. 530; *Toulmin v. Copland*, *ibid.* 625; *White v. Barton*, 18 Beav. 192.

(*k*) *Richardson v. Bank of England*, 4 M. & Cr. 174, 175, by Lord Cottenham; Dan. Ch. Pr. 8th edit. 1517.

(*l*) *Richardson v. Bank of England*, *supra*; *Meyer v. Montrieu*, 4 Beav. 343; *Scott v. Wheeler*, 12 Beav. 366.

(*m*) *Jervis v. White*, 6 Ves. 738.

(*n*) 8 C. D. 148.

(*o*) *Neville v. Matthewman*, [1894] 3 Ch. 345.

(*p*) *Re Benson*, [1899] 1 Ch. 39.

(*q*) *Per North, J.*, in *Crompton and Evans' Union Bank v. Burton*, [1895] 2 Ch. 711.

being made on originating summons for "the payment into Court of any money in the hands of the executors or administrators or trustees," applies only to money in the hands of the trustee, executor, or administrator, and if it is not in his hands, although he is responsible for it, and ought to bear it, that rule does not apply (*r*).

If failure to comply with an order for payment of money into Court is a case for attachment, it must be because it falls within the third exception to sect. 4 of the Debtors Act, 1869, which is in these terms:—"Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." In order to bring a case within that exception, it must be proved that the money ordered to be paid into Court is or has been in the actual possession or control of the person sought to be committed. Mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough (*s*).

When order for attachment will be made.

A judgment in the form that the plaintiff do recover money from a defaulting executor cannot be enforced by a four day order for payment by the defendant (*t*).

Where the only creditor of a deceased debtor has obtained in an administration action a personal order against the executor for payment of his certified debt, the fiduciary relation which previously existed between the creditor and executor is determined and the creditor cannot subsequently pursue any remedy depending on the continued existence of this fiduciary relation. He is not entitled, therefore, to an order against the executor for payment into Court of money in his hands as such executor, or to the subsequent attachment of the executor under the punitive jurisdiction reserved to the Court under the third exception to sect. 4 of the Debtors Act, 1869 (*u*).

A defaulting executor or administrator who becomes bankrupt is protected from attachment by sect. 7 of the Bankruptcy Act, 1914, replacing sect. 9 of the Act of 1883, and if he becomes bankrupt after attachment he may be released (*x*).

(*r*) *Nutter v. Holland*, [1894] 3 Ch. 408, disapproving *Re Chapman*, 54 L. T. 13.

(*s*) *Re Fewster*, [1901] 1 Ch. 447, followed by Buckley, J., in *Re Wilkins*, W. N. (1901), p. 203, but stating that he would not express any opinion of his own.

(*t*) *Re Oddy*, [1906] 1 Ch. 93.

(*u*) *Re Thomas*, [1912] 2 Ch. 348.

(*x*) *Re Manning*, 30 C. D. 480.

But sect. 7 does not take away the jurisdiction of the Court under the Debtors Act, 1869, s. 4 (3), to order the attachment of a defaulting executor against whom a receiving order has been made (y), and he cannot evade the Debtors Act by denuding himself of the assets and filing a petition in bankruptcy with the object of escaping payment (z).

The Court has jurisdiction to make an order for attachment against a married woman administratrix who fails to comply with an order for payment into Court of a sum of money belonging to the estate of the intestate (a).

Money admitted by the executor to be in the hands of his partner is in his own hands for the purpose of being ordered to be paid into Court (b).

How the executor may discharge himself.

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into Court, wholly or partially, by taking credit for sums which he shows a right to retain for his own debt, due from the testator (c), or to have allowed him on any just grounds, or which are undisputed (d). Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into Court (e).

Not by showing unauthorized payments.

But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorized application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor (f).

Freeman v. Fairlie.

In *Freeman v. Fairlie* (g), it was held that an admission by

(y) *Re Smith, Hands v. Andrew*, [1893] 2 Ch. 1.

(z) *Re Bourne, Davey v. B.*, [1906] 1 Ch. 697.

(a) *Re Turnbull*, [1900] 1 Ch. 180.

(b) *Johnston v. Aston*, 1 Sim. & Stu. 73; *White v. Barton*, 18 Beav. 192.

(c) *Middleton v. Poole*, 2 Coll. 246.

(d) *Roy v. Gibbon*, 4 Hare, 65; *Nokes v. Seppings*, 2 Phillim. 19.

(e) *Anon.*, 4 Sim. 359. See also *Proudfoot v. Hume*, 4 Beav. 477, per Lord Langdale; *Crompton and Evans' Union Bank v. Burton*, [1895] 2 Ch. 711.

(f) *Wyatt v. Sharratt*, 3 Beav. 498; *Hinde v. Blake*, 4 Beav. 597; *Score v. Ford*, 7 Beav. 333; *Roy v. Gibbon*, 4 Hare, 65; *Ingle v. Partridge*, 32 Beav. 661: or by setting up the adverse title of a third party: *Lord v. Purchase*, 17 Beav. 171; *Crompton and Evans' Union Bank v. Burton*, [1895] 2 Ch. 711, 714.

(g) 3 Mer. 39.

an executor that the whole amount of the property was near 40,000*l.*, and that the whole was invested in India on public securities, either in his name, or in the name of the house in which he was a partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands to order the payment into Court of any part of it; for though an executor dealing with money in his hands is bound to ear-mark it, yet, if he does not, and cannot answer as to the state of it, the Court has no power to act as upon an admission. But in *Roy v. Gibbon (h)*, it was said by Wigram, V.-C., that the rule was, perhaps, less strict at the present day than it was stated in *Freeman v. Fairlie*; and that the practice was, that where a party charged himself with the receipt of a fund, he was bound by that charge till he had relieved himself from it by showing a proper application of the money; and that it was not enough for him whose duty it was to know the truth and be ready with information, to leave the application in doubt, by merely expressing ignorance with regard to the charges to which the fund was liable (*i*).

If there is no danger of the property being lost, from the executor being an insolvent or otherwise, a reasonable time will be allowed for bringing the fund into Court; and a longer time will be allowed when the money is in a foreign country (*j*). And if the assets appear to have been invested on an improper security, time will be allowed (which may, in a proper case, be extended from time to time) to enable the executor to realize the security (*k*). And in fixing the day for payment time will be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into Court (*l*).

A reasonable time allowed for payment into Court.

On interlocutory proceedings the relief will be confined to the payment of money into Court, and the Court will not direct any permanent relief such as the repurchase of stock which had been sold by the executor; for that can be done only at the hearing of the cause (*m*).

Relief granted on interlocutory proceeding.

Though a receiver had been appointed during a litigation in

(*h*) 4 Hare, 65.

(*i*) See also *Hinde v. Blake*, 4 Beav. 597.

(*j*) *Roy v. Gibbon*, 4 Hare, 65.

(*k*) *Score v. Ford*, 7 Beav. 333; *Wyatt v. Sharratt*, 3 Beav. 498; *Hinde v. Blake*, 4 Beav. 599.

(*l*) *Hinde v. Blake*, 4 Beav. 599; Godefroi on Trusts, 536.

(*m*) *Futter v. Jackson*, 6 Beav. 424.

the Probate Court respecting the validity of a Will, the Court of Equity refused, on that account alone, to order the person named as executor to pay into Court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (*n*).

General rule
as to pay-
ment in.

The general rule as to payment of money into Court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured (*o*).

Applications
for—how
made.

Applications for the bringing of money or securities into Court before judgment are usually made by motion or summons. If opposed the summons is frequently adjourned into Court (*p*).

Applications
for payment
out.

An executor having been ordered to pay money into Court, is not thereby deprived of his right of retainer (*q*), nor of his lien on the fund for his costs (*r*).

The ordinary method of application for payment or transfer out of a fund in Court is by petition, but by virtue of R. S. C. 1883, Ord. LV. r. 2, in the following cases (amongst others) the application can be by summons:

1. Where there has been a judgment or order declaring the rights to the fund (*s*).

2. Where the title depends only upon proof of the identity, or the birth, marriage, or death of any person (*t*).

3. Where cash or securities not exceeding 1,000*l.* in amount or nominal value are standing to the credit of any cause or matter.

(*n*) *Reed v. Harris*, 7 Sim. 639; *Edwards v. Edwards*, 10 Hare, App. II. lxiii.

(*o*) *Freeman v. Fairlie*, 3 Mer. 29. Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the Court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into Court to the share of the plaintiff: *Score v. Ford*, 7 Beav. 333.

(*p*) Dan. Ch. Pr. 8th edit. 1525.

(*q*) *Ante*, p. 800.

(*r*) *Blenkinsop v. Foster*, 3 Younge & Coll. 207, *coram* Alderson, B.

(*s*) As to what amounts to an order declaring rights, see *Re Brandram*, 25 C. D. 366; *Re Evan Evans*, 54 L. T. 527. Where a question of construction requires decision, a petition should be presented: *Re Hicks*, 63 L. J. Ch. 568.

(*t*) *Semble*, if the amount is large a petition should be presented except in a very simple case: *Re Rhodes*, 31 C. D. 499; *Re Broadwood*, 55 L. J. Ch. 646. But North, J., held, in *Bates v. Moore*, 38 C. D. 381, that the mere size of the fund was not alone sufficient ground for a petition, unless there was difficulty in the matter as well. Cf. *Re Brandram*, 25 C. D. 366.

4. Where the application is for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise.

By Ord. LIVB. r. 5 (R. S. C. Trustee Act, 1893), it is now provided that an application under the Trustee Act, 1893, relating to a fund paid into Court in any case coming within the provisions of Ord. LV. r. 2, may be made by summons; and R. S. C. 1883, Ord. LV. r. 2 (4), (5) and (8), which related to applications under s. 32 of the Legacy Duty Act, the Trustee Relief Acts (10 & 11 Vict. c. 96 and 12 & 13 Vict. c. 74), and the Trustee Acts, 1850 and 1852, all of which are now repealed, are superseded by the above rule (*u*).

The application for payment out must be by petition, not by summons, when it is for payment of a share less than 1,000*l.* of a fund in Court exceeding 1,000*l.* in amount (*v*), or where the fund in Court consists of cash less than 1,000*l.* and securities of a less nominal amount than 1,000*l.* but both together exceeding that amount (*x*), and the costs of a petition were allowed where the fund was brought over 1,000*l.* by accrued interest (*y*).

Where the estate of an intestate is entitled to a fund in Court and the assets do not exceed 100*l.* including such fund, the Court may direct payment out without any administration being taken out (*z*).

The present practice is that as a general rule funds in Court belonging to the estate of a deceased person should not, after the expiration of ten years from his death, be paid to his legal personal representative without notice to beneficiaries (*a*).

The general rule as to papers and writings is, that an executor representing an estate should deposit them, for the benefit of the parties interested, in the Central Office (*b*), unless there are other purposes which require that he should retain them in his

(*u*) As to payment out of Court on an originating summons, see Dan. Ch. Pr. 8th edit. 1537.

(*v*) *May v. Dowse*, W. N. (1884), p. 122; *Re Evan Evans*, 54 L. T. 527.

(*x*) *Re Haworth*, W. N. (1885), p. 48.

(*y*) *Ex parte Trustees of Finsbury, &c. Savings Bank*, W. N. (1886), p. 150.

(*z*) Ord. XXII. r. 18A; S. C. F. R. 1915, r. 62.

(*a*) The former practice required notice to be given to beneficiaries of any application for payment out of Court to a legal personal representative made twenty years or more after the death of the testator or intestate. See W. N. (1904), p. 135, "Practice Note," *ante*, p. 1558.

(*b*) R. S. C. Ord. LXI. r. 31. The place for deposit is the General Filing Office, Room 83, Royal Courts of Justice.

own hands (c). But where the production of documents is required, the application for it must in all cases be made by summons at Chambers, and the party required to produce will then be ordered to file an affidavit, stating what documents he has, or has had, in his possession or power relating to the matters in question, and to produce them (excepting such as he may by his affidavit object to produce) to the party requiring production (d).

Vesting
orders as to
land under
sect. 26 of
Trustee Act,
1893.

By the Trustee Act, 1893, s. 26, the High Court is empowered to make an order for the vesting of land in any such person, in any such manner and for any such estate as it may direct, in any of the following cases:—

- (i.) Where the High Court appoints or has appointed a new trustee;
- (ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person, is an infant, or out of the jurisdiction, or cannot be found;
- (iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land;
- (iv.) Where as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead;
- (v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and
- (vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required by or on behalf of a person entitled to require a conveyance of the land or a release of the

(c) *Freeman v. Fairlie*, 3 Mer. 30.

(d) See Ord. XXXI. r. 14. *Primâ facie* evidence in support of a claim will entitle a creditor in an administration suit to an order directing the executors to file an affidavit as to their possession of documents relating to the claim, or to any item in it: *Re McVeagh*, 1 De G. J. & S. 399. The old practice was for the party producing the documents to leave them at the Record and Writ Clerk's Office (now the Central Office). It is now the ordinary practice to produce them at his solicitor's office, but this is only a matter of indulgence and convenience: *Prestney v. Mayor of Colchester*, 24 C. D. 379.

right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

or in the case of any such contingent right, the Court may release or dispose of it to such person as it may direct.

Similarly by sect. 29 of the same Act the Court is empowered to make vesting orders in the case of mortgaged lands, where there is a difficulty in obtaining a reconveyance from the heir or personal representative or devisee of the mortgagee, by reason of his being out of the jurisdiction, or refusing to convey, or by reason of there being no heir or personal representative of a mortgagee who has died intestate as to the land, or of any uncertainty as to the identity of the heir or personal representative or devisee of the mortgagee as to whether he is living or dead.

Sect. 35 contains similar provisions to those of sect. 26 with respect to vesting orders as to stock and choses in action.

By sect. 50 of the Act (the interpretation clause), the expressions "trust" and "trustee" include *inter alia* the duties incident to the office of personal representative of a deceased person.

Sect. 135 of the Lunacy Act, 1890, empowers the Judge in lunacy to vest land in such persons for such estate and in such manner as he directs, where it is vested in a lunatic (e) solely or jointly upon trust or by way of mortgage; and by sect. 136 of the same Act, where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock or to receive the dividends thereof or to sue for the chose in action, and where the lunatic is jointly so entitled, then in the person or persons with whom he is jointly entitled either alone or jointly with any other person or persons (f); and by sub-sect. (3) of the same section, where any stock is standing in the name of a

Vesting orders under sect. 29 of same Act, in place of reconveyance of mortgaged lands.

Vesting orders under sect. 35 of stock and choses in action.

Definition of "trust" and "trustee" in Trustee Act, 1893.

Provisions of Lunacy Act, 1890, as to lunatic trustees.

(e) By sect. 341 of the Act a lunatic is defined as meaning an idiot or person of unsound mind.

(f) Under the corresponding section (sect. 5) of the Trustee Act, 1850, where one of three executors of the surviving executor of a testator was of unsound mind, an order was made giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator: *Re Wacker*, 22 C. D. 535.

deceased person whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof or to sue for the chose in action in any person or persons he may appoint (*g*).

Lunacy Act,
1911.

By the Lunacy Act, 1911, it is provided that these powers are now to be exercised by the High Court except in so far as they relate to lunatic mortgagees who are not also trustees, thus avoiding the difficulties which formerly arose in determining whether an application should be made in Chancery or Lunacy in any given case (*h*).

Definition of
"trust" and
"trustee" in
Lunacy Act,
1890.

The words "trust" and "trustee" are defined in sect. 341 of the Lunacy Act, 1890, as including *inter alia* the duties incident to the office of personal representative of a deceased person.

Judicial
Trustees
Act, 1890.

By the Judicial Trustees Act, 1896, it is now enacted that the Court may, in its discretion, on application by or on behalf of any person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, appoint a judicial trustee of the trust, either solely or jointly with any other person, and, if sufficient cause is shown, in place of all or any existing trustees (*i*).

And sect. 1 (2) of the Act provides that the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee within the meaning of the Act.

Sect. 3 of the Act provides for the relief of trustees acting honestly and reasonably against the consequences of a breach of trust (*k*).

Summons for
the appoint-
ment of new
trustees and
for vesting
orders.

Prior to 1889 applications to the Court for the appointment of new trustees, or for vesting orders, were by petition; but by Ord. LV. r. 13a (printed as rule 5 of Ord. LIVB.), it is now provided that the following applications under the Trustee Act, 1893, may be made by summons:—

(a) For the appointment of a new trustee with or without a vesting or other consequential order;

(*g*) Cf. the corresponding section (sect. 6) of the Trustee Act, 1850. And see *Re White*, L. R. 5 Ch. 698.

(*h*) See Dan. Ch. Pr. 7th edit. p. 1791.

(*i*) The Court has power under this Act to remove an executor and appoint a judicial trustee: *Re Ratcliff*, [1898] 2 Ch. 352.

(*k*) *Ante*, p. 1448.

(b) For a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or Judge, or out of Court;

(c) For a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock, or the suing for or recovering any chose in action.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer: If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted: It is a more difficult question, as between an executor, bound to produce, and his partner in trade: but if the partners have *permitted* him to mix the accounts, it seems they cannot afterwards object to the production: clearly they cannot do so, in a case where the executor has admitted having lent to his firm part of the trust property, and that the firm has been dealing with it (*l*).

Duty of executor to keep clear accounts.

In the case of *Freeman v. Fairlie* (*m*), an executor in India, coming to England, and after twenty-one years, being called upon to account, alleged that he had left his books, &c., behind him in India; but he was nevertheless ordered to produce copies of all entries in such books, &c., within six months, though it was impossible he could do so, in order that the Court might have an opportunity from time to time of seeing that he had used proper diligence.

Trustees can, where they are required to furnish accounts in respect of their trust estate, demand to be paid or to be guaranteed the costs of doing so, before complying: it makes no difference that one of the trustees is a solicitor (*n*).

Costs of furnishing accounts.

Under the usual administration decree obtained on a writ or originating summons, an executor or administrator can only be charged for actual receipt by himself, or his agent, not for a default of his co-trustee (*o*). The practice is to make executors

What an executor is liable to account for under the

(*l*) *Freeman v. Fairlie*, 3 Mer. 43, 44. The Court, however, will not order a defendant, who has a joint possession of a document with someone else not before the Court, to produce the document itself: *Taylor v. Rundell*, Cr. & Ph. 111; Dan. Ch. Pr. 8th edit. 632.

(*m*) 3 Mer. 44.

(*n*) *Re Bosworth*, 58 L. J. Ch. 432.

(*o*) *Re Fryer*, 3 K. & J. 317; *Blakeley v. Blakeley*, 1 Jur. N. S. 368.

usual administration decree.

Wilful default.

Order on footing of wilful default can be made at any stage of action. After common decree leave necessary.

How raised where no pleadings. Not asked for at judgment.

Allegations of wilful default must be proved at hearing;

and administrators only account for the money they themselves have received, not for what they might have received, but for their own default; to make them account, on the latter footing, a special case must be made (*p*), and the plaintiff must aver and prove at least one act of wilful default (*q*), and if what is averred is admitted, the practice is only to make the common decree, adding a submission by the executor to account with respect to the matters so admitted (*r*).

An order charging wilful default can be made at any time during the action (*s*) on a proper case being shown (*t*).

Where a common administration order has been obtained against a defendant, the leave of the Court must be obtained, in order to continue the action against him on the footing of wilful default (*u*). But leave may be obtained to bring a fresh action charging wilful default without proving that the fresh information on which the new action is founded was not acquired in time to be utilised in the first action (*v*).

In actions in which there are no pleadings a charge of wilful default can be raised by affidavit (*x*).

If the statement of claim alleges wilful default, but the judgment at the trial gives no relief on that footing, but does not dismiss the claim for that relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default, direct further accounts and inquiries on that footing (*y*).

Where the plaintiff by his statement of claim alleges wilful default, he must be prepared to support his allegations at the hearing; he has no right to insist on the question of wilful default being left to be decided at some subsequent stage of the action (*z*). But it is competent for the Court upon further con-

(*p*) *Shepherd v. Towgood*, T. & R. 379, 388; *Pybus v. Smith*, 1 Ves. 193; *Barber v. Mackrell*, 12 C. D. 534; *Re Stevens*, [1897] 1 Ch. 422; [1898] 1 Ch. 162 (A. C.). But see *Bulstrode v. Bradley*, 3 Atk. 582; *Re Stuart*, 74 L. T. 546; *Re Newland*, W. N. (1904) 181, *ante*, p. 1492.

(*q*) *Sleight v. Lawson*, 3 K. & J. 292; *Re Youngs*, 30 C. D. 421; *Re Stevens*, [1897] 1 Ch. 422, 432, *per North*, J.

(*r*) *Wildes v. Dudlow*, W. N. (1870), p. 231.

(*s*) *Ante*, p. 1511.

(*t*) *Job v. Job*, 6 C. D. 562; *Mayer v. Murray*, 8 C. D. 424; *Barber v. Mackrell*, 12 C. D. 534.

(*u*) *Laming v. Gee*, 10 C. D. 715; but see *Re Barclay*, *infra*.

(*v*) *Re Kurtz*, 90 L. T. 12; cf. *Re Wrightson*, [1908] 1 Ch. 789.

(*x*) *Barber v. Mackrell*, 12 C. D. 534.

(*y*) *Re Symons*, 21 C. D. 757.

(*z*) *Smith v. Armitage*, 24 C. D. 727.

sideration to charge compound interest on balances in hand although no case of wilful default was raised by the pleadings (a).

The burden of proof is on the party alleging wilful default, and he must show not only a loss, but a loss under such circumstances as to show default on the part of the executor or administrator (b).

burden of
proof of wil-
ful default:

Particulars of the allegations of wilful default should be given in the pleading (c).

particulars
of:

Accounts on the footing of wilful default cannot be obtained under Ord. XV. (d).

If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate order for payment without taking the accounts (e). The same doctrine prevails though the executor denies assets in hand at the time of filing his answer, if he also discloses that he had at one time sufficient assets, but that he has since misapplied them (f). An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the Court think fit to give them (g).

When the
Court will
decree pay-
ment of the
plaintiff's
demand
without first
decreeing an
account:

Again, if it is charged that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plaintiff can sustain this allegation, he will entitle him-

where the
executor has
made himself
personally
liable by
admitting
assets, &c.:

(a) *Re Barclay*, [1899] 1 Ch. 674; cf. *Re Newland*, ante, p. 1493.

(b) *Re Brier*, 26 C. D. 238.

(c) *Re Anstier*, 54 L. J. Ch. 1104. See also R. S. C., Ord. XIX. r. 6, and Forms, App. "C." s. 2, Nos. 2 and 9.

(d) *Re Bowen*, 20 C. D. 538.

(e) *Woodgate v. Field*, 2 Hare, 211. Where the answer admitted assets, but insisted that, under the circumstances stated, the legacy sought to be recovered had been paid, it was held that the plaintiff had a right to read the passage admitting the assets, without reading that as to the payment of the legacy: *Connop v. Hayward*, 1 Y. & C. C. C. 33. An admission of assets by the executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed: *Wall v. Bushby*, 1 Bro. C. C. 484.

(f) *Rogers v. Soutten*, 2 Keen, 598.

(g) *Philanthropic Society v. Hobson*, 2 M. & K. 357. If there are several executors and some admit assets, yet an account may be decreed against the rest: *Norton v. Turvill*, 2 P. Wms. 145. Where in an examination put in by two executors, it was stated that their receipts had been joint, but it appeared by affidavit that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental affidavit, to correct the mistake: *Hewes v. Hewes*, 4 Sim. 1.

self to a decree for payment at once (*h*). And the general rule is, that an admission of assets by an executor or administrator can never be retracted in a Court of Equity, unless a case of mistake be most clearly established (*i*). If, however, a strong case be made out, this may enable the Court to relieve him from the admission (*k*): as if the money were in a banker's hands, who fails: But the executor or administrator must clearly prove the mistake, and show that the circumstance, on which he built his admission, failed (*l*).

The admission of assets by an executor will not preclude creditors from coming on a fund specifically appropriated for their benefit, although that fund may have been disposed of to a purchaser (*m*).

what is an
admission of
assets.

With respect to what amounts to an admission of assets, it was held in a case (*n*), where the deceased gave money upon mortgage to a charity in Ireland, that his executrix by her own Will attempting to provide other means for payment of that legacy, and stating as a reason that his personal estate was out on mortgage, thereby admitted assets of her testator (*o*). Payment of interest for a legacy by the executor, from time to time, will be evidence of assets, though a single instance of payment of interest will not (*p*). So where executors, from time to time, had made some payments on account of principal and interest

(*h*) *Barnard v. Pumfrett*, 5 M. & Cr. 63; *Dimsdale v. Dudding*, 1 Y. & C. C. C. 265. See *Re Marvin*, [1905] 2 Ch. 490.

(*i*) *Drewry v. Thacker*, 3 Swanst. 548; *Roberts v. Roberts*, cited 1 Bro. C. C. 487.

(*k*) See *Foster v. Foster*, 2 Bro. C. C. 619; *Young v. Walter*, 9 Ves. 365.

(*l*) *Horsley v. Chaloner*, 2 Ves. Sen. 85, *post*, p. 1612.

(*m*) *Curtis v. Blow*, 2 Barn. & Adol. 426.

(*n*) *Campbell v. Lord Radnor*, 1 Bro. C. C. 271; *Barnard v. Pumfrett*, 5 M. & Cr. 70.

(*o*) See also *Elliott v. Holwell*, 1 Cas. temp. Lee, 574.

(*p*) *Corporation of Clergymen's Sons v. Swainson*, 1 Ves. Sen. 75; *Barnard v. Pumfrett*, 5 M. & Cr. 63, 70, by Lord Cottenham; *Att.-Gen. v. Chapman*, 3 Beav. 255; *Att.-Gen. v. Higham*, 2 Y. & Coll. Ch. C. 634. But payment of the interest of a specific or demonstrative legacy, when that payment is clearly not made out of the general assets, nor a payment referable to the general assets, is not an admission of general assets: *Severs v. Severs*, 1 Sm. & G. 400. Executors having invested an infant's legacy in their partnership concern, it was held that the entry by them in the partnership books of the amount of the legacy to the credit of the legatee was a sufficient admission of assets, there being no evidence that the entries were mistaken, and the course of conduct observed being consistent with them: *Townend v. Townend*, 1 Giff. 201. For an instance in which a similar entry was held not to amount to an admission of assets, see *Hutton v. Rossiter*, 7 De G. M. & G. 9.

on a legacy, and, about nine years after the testator's death, passed their accounts at the Legacy Duty office, showing a considerable residue; Lord Langdale held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking an account of the testator's estate (*q*).

But in *Postlethwaite v. Mounsey* (*r*), it was held by Wigram, V.-C., that payment by the executor of the interest of a legacy to the tenant for life under the Will was not conclusive as an admission of assets by the executor; but that such payment might be explained as having been made by mistake, or for other reasons or causes; and that in that case the usual account of assets might be directed: And his Honour observed, that it would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the Will: Suppose a case in which small legacies were given to servants, and the executor chose, on his own responsibility, to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the Will: In the subsequent case of *Savage v. Lane* (*s*), the same learned Judge held, that, at all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself personally liable, but prays that an account may be taken and the estate administered, the executor's admission in his answer that he has paid certain legacies is not such an admission of assets as to entitle the plaintiff to a decree without taking the account.

The payment of interest on a legacy, or payment of a legacy not conclusive.

The general rule, however, is that an admission of assets by the executor to one claimant on them is an admission to all (*t*). General rule.

In *Holland v. Clark* (*u*), Sarah Clark bequeathed a legacy of 150*l.* to Susannah C., when she should attain 21: The testatrix died in 1811, and the legatee did not attain 21 till several years

(*q*) *Whittle v. Henning*, 2 Beav. 396. See further, as to admission of assets by having given a legatee the legacy office receipt for duty on the legacy, *Lazonby v. Rawson*, 2 Sm. & G. 267; 4 De G. M. & G. 556; *S. C.*

(*r*) 6 Hare, 33, note (*a*). See also *Cadbury v. Smith*, L. R. 9 Eq. 37.

(*s*) 6 Hare, 32. See also *Cadbury v. Smith*, L. R. 9 Eq. 41; *Billing v. Brogden*, 38 C. D. 546.

(*t*) *Cook v. Martyn*, 2 Atk. 2; *Barnard v. Pumfrett*, 5 M. & Cr. 70, by Lord Cottenham.

(*u*) 2 Y. & Coll. Ch. C. 319; conf. *Stephens v. Venables*, 31 Beav. 124.

afterwards, and she then married: In 1825 the executors signed and gave to her husband this memorandum: "We separately and jointly acknowledge to owe to George Holland the sum of 150*l.*, being a legacy left to his wife by the late Sarah Clark, and 50*l.* interest thereon:" And it was held by Knight Bruce, V.-C., that, under the circumstances, this memorandum amounted to an admission of assets by the executors.

The authorities as to the probate stamp being admissible, and its effect in evidence as to the amount of assets, have already been examined (*x*).

It only remains to be noticed that an admission is always susceptible of explanation. Thus, in *Payne v. Little* (*y*), Romilly, M. R., observed, that every admission of assets made by an executor, whether it be made by his acts or by an express admission in words, must have reference to the circumstances which he was then acquainted with, and if "the circumstances on which he built his admission fail him" (an expression used by Sir John Strange in *Horsley v. Chaloner* (*z*)), then the admission fails also, and he cannot be bound by an admission made under circumstances with which he was not acquainted.

Remedy for
devastavit.

If an executor changes the nature of the testator's estate, the general rule is, that this is a conversion; and as money has no earmark, it cannot be followed (*a*); but the executor by such transactions has made himself liable to a *devastavit* (*b*), for which the party injured must seek satisfaction out of the executor's own effects (*c*). If an executor purchases estates with the assets, and takes the conveyance in his own name, without the trust appearing on the face of the deeds, the estate will not be liable to the trusts, although he die insolvent, unless the application of the purchase money can be clearly proved (*d*).

(*x*) See *ante*, p. 1571.

(*y*) 22 Beav. 69. See also *Cadbury v. Smith*, L. R. 9 Eq. 41.

(*z*) 2 Ves. Sen. 83.

(*a*) That is, it cannot be followed in the hands of a stranger to the trust, although it can be followed in the hands of the trustees and those claiming under him. See *Re Hallett's Estate*, 13 C. D. 696.

(*b*) *Waite v. Whorwood*, 2 Atk. 159. A married woman executrix was, after the death of her husband, held liable for a *devastavit* committed by him during their joint lives: *Soady v. Turnbull*, L. R. 1 Ch. 494.

(*c*) *Charlton v. Low*, 3 P. Wms. 330.

(*d*) 2 Sugd. Vend. & Purch. 148, 9th edit. See *Kendar v. Milward*, 2 Vern. 440; *Kirk v. Webb*, Prec. Chanc. 84; *Deg v. Deg*, 2 P. Wms.

But if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed, as much as if it had continued in the same condition as at the testator's death (*e*).

The general question, as to the right of creditors and legatees to follow the assets into the hands of the person to whom the executor has aliened them, has been investigated in a former part of this Work (*f*).

In *Skinner v. Sweet* (*g*), it appeared that an executrix, in respect of her receipt as such, was considerably indebted to the estate, and that she had an annuity of 250*l.* given to her by the Will: Sir John Leach, V.-C., directed, that her annuity, as it became due, should be applied in payment of the debt due to the estate, with liberty to apply to the Court when the debt due to the estate should be discharged. So where an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the executor, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust (*h*).

The party injured by a *devastavit* is but a simple contract creditor of the executor (*i*), and the claim is consequently barred after the lapse of six years by the Statute of Limitations (*k*), but this did not, before the Trustee Act, 1888, apply to an action by a beneficiary against the executor (or his estate) who had committed the *devastavit*, as the debt arose from a breach of trust on his part, and from this the Statute of Limitations did not protect him (*l*).

In *Geary v. Beaumont* (*m*), a specific legacy was given to an executor, who afterwards became bankrupt, and committed a

Following assets.

Party injured, a simple contract creditor only.

Bankrupt or insolvent executor.

414, 415; *Ryall v. Ryall*, 1 Atk. 59; *Wilkins v. Stevens*, 1 Y. & Coll. 431. (*e*) 2 Atk. 159.

(*f*) *Ante*, p. 693. See also *Downes v. Power*, 2 Ball & B. 491; *Silver v. Stein*, 1 Drew. 295; *Collinson v. Lister*, 20 Beav. 356; *Re Eustace*, [1912] 1 Ch. 561.

(*g*) 3 Madd. 244.

(*h*) *Morris v. Livie*, 1 Y. & Coll. Ch. C. 380, *ante*, pp. 1091, 1135. See also *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Re Dacre*, [1916] 1 Ch. 344; *Re Pain*, [1919] 1 Ch. 38.

(*i*) *Charlton v. Low*, 3 P. Wins. 331.

(*k*) *Thorne v. Kerr*, 2 Kay & J. 54.

(*l*) *Re Marsden*, 26 O. D. 783. As to the effect of the Trustee Act, 1888, see *post*, p. 1642.

(*m*) 3 Mer. 431.

devastavit. The subject of the specific bequest was sold by its assignees: and Sir W. Grant held that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the Will, but that such parties were only entitled to prove to the amount of the *devastavit*.

If an executor becomes bankrupt, having wasted the assets, a proof for the *devastavit* can be taken in under the bankruptcy (*n*). An executor and trustee having committed a *devastavit*, cannot prove under his own bankruptcy without obtaining an order from the Court (*o*). Generally speaking, such order will be made on the application of a bankrupt who is sole executor (*p*), but, if leave to prove be given, the dividends should be secured and not allowed to come into the bankrupt's hands (*q*).

Debt due under a *devastavit*, due from what time.

In the case of an executor committing a *devastavit*, and a decree for payment of the amount, the debt is considered as due from the time of the *devastavit*, and not from the date of the decree; and therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held that as he had, between the time of the *devastavit* and the date of the decree, taken the benefit of the Insolvent Debtors Act, and had been ordered to be discharged by the Court of Quarter Sessions, he might be brought up on a *habeas corpus* before the Chancellor, and discharged (*r*).

A defaulting bankrupt executor protected from attachment.

A defaulting executor or administrator who becomes bankrupt is protected from attachment by sect. 7 of the Bankruptcy Act, 1914 (*s*), which provides that, after the making of a receiving order, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bank-

(*n*) Toller, 429.

(*o*) See *Ex parte Colman*, 2 Dea. & Ch. 584. Where the bankrupt is one of several executors, and has before his bankruptcy received a part of the assets, the other executors may prove the amount against his estate: *Ex parte Brown*, 1 Dea. & Ch. 118; *Ex parte Phillips*, 2 Deac. 334.

(*p*) *Ex parte Shaw*, 1 Glyn & Jam. 127; *Ex parte Wyatt*, 2 Deac. & Ch. 211.

(*q*) *Ex parte Leeke*, 2 Bro. C. C. 597; *Ex parte Shaw*, 1 Glyn & Jam. 127; *Ex parte Colman*, 2 Deac. & Ch. 584; *Ex parte Moody*, 2 Rose, 413.

(*r*) *Wheldale v. Wheldale*, 16 Ves. 376; 3 Madd. Pract. 458, 2nd edit.

(*s*) Replacing sect. 9 of the Bankruptcy Act, 1883; but see *ante*, p. 1600.

ruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose. If he becomes bankrupt after he has been attached he may be released; he is protected from arrest by the order in bankruptcy (*t*).

Property held by a bankrupt in trust for any other person is expressly excluded from the property divisible amongst his creditors by sect. 38 of the same Act. But where the trustee has a right of indemnity in the nature of a lien upon the goods, such right will pass to the trustee in his bankruptcy, and will have priority over the rights of an execution creditor (*u*).

Exclusion of trust property from property divisible amongst bankrupt's creditors.

The issue of a summons under rule 3 of Ord. LV. does not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought (*x*).

Interference with the discretion of executors, &c.

Even a judgment for administration does not deprive executors or trustees of the right to exercise a discretionary power vested in them (*y*), except so far as the exercise conflicts with the order (*z*); for instance, they can exercise a power of appointing new trustees (*a*) but the Court will see that improper persons are not appointed, and if a person of whom the Court does not approve is appointed, it will call on the trustees to make a fresh appointment. The fact that the decree directs the appointment of new trustees does not take from the trustees their right of appointment, though after decree they can only exercise it subject to the supervision of the Court (*b*). An administration decree does not prevent trustees from exercising a power of sale (*c*).

Effect of a judgment for administration.

Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees or one of them, if

Discretionary power given to trustee.

(*t*) *Re Manning*, 30 C. D. 480; and see *ante*, p. 1600.

(*u*) *Jennings v. Mather*, [1902] 1 K. B. 1.

(*x*) R. S. C. Ord. LV. r. 12.

(*y*) *Tempest v. Lord Camoys*, 21 C. D. 571, 576, note; *Re Gadd*, 23 C. D. 134; *Re Burrage*, 62 L. T. 752.

(*z*) *Re Hall*, 33 W. R. 508.

(*a*) *Tempest v. Lord Camoys*, *supra*; *Re Gadd*, *supra*.

(*b*) *Re Gadd*, *supra*.

(*c*) *Re Mansel*, 33 W. R. 727.

such one reasonably entertains a different opinion from that of his co-trustees as to the desirability of exercising it in the particular manner proposed, but it will prevent them from exercising it improperly (*d*); and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it (*e*).

Remedy of a creditor of the business.

The remedy of a creditor of the business for a debt incurred since the death of the testator or intestate, is against the executor or administrator personally, and not against the estate of the deceased (*f*); and the creditor's remedy is by action at law against the executor or administrator, and he has no right to have the estate of the deceased administered (*g*). But a creditor of the business whose debt has been incurred since the decease, can make the executor render to him an account of the assets of the deceased which have been employed in the business since the death (*h*).

A creditor's right to an account of the assets employed in a business.

Lapse of time and an enjoyment of the testator's assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may raise an inference of a gift of the assets by the beneficiaries to the executor, and enable his judgment creditor to take them in execution. But when the provision and the time which has elapsed are in accordance with the trusts of the Will, no such inference can arise (*i*).

Remedy of a creditor where the business is properly carried on.

As has been pointed out in the chapter on remedies for an executor in equity, where the executor or administrator properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be, otherwise properly applied (*j*) for the purposes of the business. In such case, creditors whose debts have been incurred since the death of the deceased, are entitled to stand in the

(*d*) *Tempest v. Lord Camoys*, *supra*.

(*e*) *Re Burrage*, 62 L. T. 752.

(*f*) *Farhall v. Farhall*, L. R. 7 Ch. 123; *Re Evans*, 34 C. D. 597. See *ante*, p. 1397, and also p. 1537 *et seq.*

(*g*) *Owen v. Delamere*, L. R. 15 Eq. 134; *Strickland v. Symons*, 26 C. D. 245.

(*h*) *Thompson v. Dunn*, L. R. 5 Ch. 573.

(*i*) *Re Morgan*, 18 C. D. 93; and cf. *Jennings v. Mather*, [1901] 1 K. B. 108; [1902] 1 K. B. 1.

(*j*) *E.g.*, where the business is only carried on for the purpose of being realized. See *ante*, p. 1537.

place of the executor or administrator, and to claim that the fund, out of which he is entitled to indemnity, shall be applied in payment of their debts (*k*), and with like priority (*l*).

The same principle applies to the case of the trustee claiming a right of indemnity for a tort, as where an injury had been occasioned to an adjoining owner by letting down the surface of land, in the reasonable management and working of the testator's estate, and damages were recovered against the trustee personally, it was held that the adjoining owner was entitled to stand in the place of the trustee and to claim the benefit of his right to indemnity so as to obtain payment of the damages direct out of the testator's estate (*m*).

Where the executor is in default to the specific trust estate he is authorized to employ in the trade, the creditors of the trade are in no better position than the executor himself, and as he is only entitled to be indemnified against the debt he has incurred in carrying on the trade upon the terms of making good his default, the creditors are only entitled to have their debts paid out of the specific assets when the default is made good (*n*).

Where
executor in
default.

But where a testator's business is carried on after his death by his trustees under a power in the Will, the right of the creditors of the business to be paid out of the trust estate in priority to the creditors of the testator, by virtue of the trustees' right of indemnity in respect of the debts properly incurred by them in carrying on the business, is not precluded by the fact that one of the trustees has been found a defaulter, since each of the trustees who has acted properly is entitled to be indemnified (*o*).

Where neither the whole nor any specific part of the estate is properly applicable to carrying on the trade, creditors of the business have no right to recover their debt out of the trust funds (*p*), but they are entitled to any interest the executor may have in such trade as against the trust estate, *e.g.*, the right to

Where no
specific part
of estate can
be employed
in carrying
on the
business:

(*k*) *Ex parte Garland*, 10 Ves. 120; *Ex parte Edmonds*, 4 D. F. & J. 488.

(*l*) *Moore v. M'Glynn*, [1904] 1 Ir. 334.

(*m*) *Re Raybould*, [1900] 1 Ch. 199.

(*n*) *Re Johnson*, 15 C. D. 548; see *Re British Power, &c. Co.*, [1910] 2 Ch. 470.

(*o*) *Re Frith*, [1902] 1 Ch. 342.

(*p*) *Strickland v. Symons*, 22 C. D. 666; 26 O. D. 245.

be repaid moneys he has advanced or become liable to pay in respect of the business (q).

right of
indemnity as
against
creditors of
the testator.

The executor is, as against the beneficiaries, entitled to be indemnified by the trust estate against the debts incurred by him in carrying on the trade out of the specific part of the testator's estate, which he is authorized by the Will to employ in the trade, but this right to indemnity does not apply as against the creditors of the testator unless such creditors had knowledge that the testator's business was being carried on by the executor, and have acquiesced in such trading (r).

*Dowse v.
Gorton.*

Where the executor of a deceased trader had carried on his business for three years after his death, in accordance with the provisions of his Will and with the assent of the testator's creditors, the Court of Appeal held that the executors had a right to be indemnified against all liabilities incurred by them in carrying on the trade out of the assets acquired subsequently to the testator's death, and that their right to indemnity was confined to such assets, and it also held that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim (s). The House of Lords, on appeal, held that, as the creditors of the testator had acquiesced in the business being carried on by the executors, the executors were entitled to be indemnified out of the testator's estate against the liabilities which they had properly incurred in carrying on the business, and that their right to indemnity was not limited to the assets acquired subsequently to the testator's death, and that the executors were entitled to indemnity, not only as against the beneficiaries, but also as against the testator's creditors (t).

Priority of
creditors of
the executors.

The effect of giving the executors so wide a right of indemnity is to give the creditors of the business, subsequent to the testator's death, a priority over the creditors of the testator in cases where they acquiesced in the trading. This makes it exceedingly important for the creditors of a deceased trader to protect themselves against the risk of the executors carrying on the business at a loss by requiring the estate to be administered without delay.

Where there is no power under the Will to carry on the business, and it is carried on for the benefit of the widow and

(q) *Re Evans*, 34 C. D. 597.

(r) *Dowse v. Gorton*, [1891] A. C. 190.

(s) *Re Gorton*, 40 C. D. 536.

(t) *Dowse v. Gorton*, [1891] A. C. 190.

without the assent of the testator's creditors, the executors are not entitled to an indemnity in priority to such creditors—merely standing by with knowledge that the business is being carried on does not constitute assent by the creditors (*u*).

In cases like *Douse v. Gorton*, where the business has been carried on after the testator's death, and the estate is insolvent, the rights of the creditors of the testator, and the creditors of the executors, will conflict, and the question whether a creditor of the one class or the other is to have the conduct of the administration proceedings will probably be governed by the extent to which the estate is deficient. If, for example, the estate is likely to be sufficient only to pay the creditors of the executors, it may be that the conduct of the proceedings will be given to one of them, but if there is likely to be a surplus after satisfying the claims of the creditors of the executors, the conduct of the proceedings should be given to a creditor of the testator as having the greater interest in the administration.

Conduct of proceedings.

The principle of *Douse v. Gorton* is applicable where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, and whether the Will does or does not contain a power to carry on the business (*v*).

Extension of principle of *Douse v. Gorton*.

In claims by creditors against the estate of a dead man the Court looks with suspicion upon a claim which is supported only by the uncorroborated evidence of the claimant (*x*), but there is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration, although the Court will in general require such corroboration (*y*).

Uncorroborated claim.

It has been shown, in a previous part of this Work (*z*), under what circumstances an executor may retain a legacy, by way of set-off against a debt due from the legatee to the testator (*a*). But the executor cannot set off, against

Set-off.

(*u*) *Re Oxley*, [1914] 1 Ch. 604.

(*v*) *Re Brooke*, [1894] 2 Ch. 600; and see *O'Neill v. McIlrorty*, [1915] 1 Ir. 1.

(*x*) *Hill v. Wilson*, L. R. 8 Ch. 888.

(*y*) *Re Hodgson*, 31 C. D. 177. See also *Re Finch*, 23 C. D. 267; *Re Farman*, 57 L. J. Ch. 637, 639. See *ante*, p. 1392.

(*z*) *Ante*, p. 1049 *et seq.* See also *Richards v. Richards*, 9 Price, 219.

(*a*) In *Re Knapman*, 18 C. D. 300, legatees brought an action against the executor, seeking revocation of probate. While this action

a demand upon him as executor, a debt due to him individually (b).

Meaning of
"administra-
tion action:"

The usual form of relief now given by the Chancery Division against an executor or administrator is to compel him to properly account for the assets of his testator or intestate, and to see that these assets are properly distributed amongst the persons entitled to them, namely, first, the creditors of the deceased, and, secondly, the beneficiaries under the Will or the persons entitled under the intestacy (c).

how com-
menced:

An administration action, like other actions, can usually be commenced by the issue of a writ of summons, but the Rules of the Supreme Court, 1883, provide that, in most cases, creditors or beneficiaries can commence proceedings against executors or administrators by originating summons, and in such proceedings obtain full or partial administration of the dead man's estate.

originating
summons.

Rules 3 and 4 of Ord. LV. of the Rules of the Supreme Court, 1883, dealing with originating summonses, will be found set out in the chapter on remedies for an executor in equity (d).

When a
creditor can
commence
proceedings
by summons.

A creditor is entitled to obtain an order for administration upon an originating summons, where the dispute as to his debt depends on a question of law, but not where his debt depends on disputed facts (e); in the latter case, he should commence proceedings by writ of summons.

Proceedings
before
probate or
letters of

Ord. LV. r. 4, only authorizes an administration summons to be taken out by a creditor against executors, administrators, and

was pending they mortgaged their shares. They failed in the action, and were ordered to pay costs. Subsequently they brought an action for the administration of the estate. The executor was held entitled to set off the costs in the probate action against the legacies, notwithstanding the incumbrances. But see *Re Harrald*, 52 L. J. Ch. 436; *Re Pain*, [1919] 1 Ch. 38.

(b) *Whitaker v. Rush*, Ambl. 407; *Medlicot v. Bowes*, 1 Ves. Sen. 208; *Gale v. Luttrell*, 1 Younge & Jerv. 180; and see *ante*, pp. 1501, 1563. But in — *v. Wood*, 2 P. Wms. 131, money lent and goods delivered by the executor to the legatee were held to be in part payment, and the Court said that the executor, if sued in equity for the legacy, might have insisted that the legatee had received so much of it by money and goods.

(c) It has been held in Ireland that the widow of an intestate entitled under the Intestates' Estates Act, 1890, to a charge of 500*l.* upon his real and personal estate has a sufficient interest in the real estate to entitle her to maintain an administration action: *McFinan v. McFinan*, [1897] 1 Ir. R. 66.

(d) See *ante*, pp. 1525, 1526.

(e) *Re Powers*, 30 C. D. 291, *post*, p. 1622.

trustees, and an originating summons taken out by a creditor against a person before administration is entirely bad (f). administration granted:

The legal personal representative of a deceased intestate is a necessary party to an administration suit, and no decree can be made in such a suit in Ireland against a party who has obtained letters of administration in England which have not been resealed in England, even though such party is resident in Ireland (g).

An annuitant under covenant by the testator whose annuity is not in arrear, is not a creditor, and cannot apply for administration of the estate of the deceased, even although the estate of the deceased is not sufficient to pay the estimated value of the annuity as well as the other debts and liabilities (h). by annuitant:

There is only jurisdiction on an originating summons under Rules 3 and 4 of Ord. LV., to decide such matters as could have been decided in an administration suit, as, for instance, points relating to the administration of the estate and questions between executors and legatees, there is no jurisdiction on such a summons to decide questions as against persons claiming adversely to the estate (i), or questions as to legal devisees or between legal devisees (j). Matters which can be decided on an originating summons.

Unless the objection to the want of jurisdiction is taken in the Court below, it appears that the Court of Appeal will not entertain the objection (k), and the objection must be taken in Chambers or the defendant will not be allowed his costs of the adjournment into Court (l). When the objection to the jurisdiction must be taken.

Ord. LV. r. 4a (R. S. C., October, 1899), provides that if, for the purposes of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or devisee or legatee of the person who has died, having real estate vested in him within the meaning of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act

(f) *Re Leask*, W. N. (1891) p. 159.

(g) *Re M'Sweeney*, [1919] 1 Ir. R. 16.

(h) *Re Hargreaves*, 44 C. D. 236; and see *Re Beeman*, [1896] 1 Ch. 48.

(i) *Re Royle*, 43 C. D. 18; *Re Bridge*, 56 L. J. Ch. 779; *Re Gladstone*, W. N. (1888) p. 185.

(j) *Re Carlyon*, 56 L. J. Ch. 219; *Re Davies*, 38 C. D. 210. As to special applications by originating summons to determine questions of construction under a deed, Will, or other written instrument, see Ord. LIVa.

(k) *Re Turcan*, 58 L. J. Ch. 101.

(l) *Re Davies*, *supra*.

may be given on any originating summons taken out under Rules 3 or 4 of Ord. LV.

It would seem that an originating summons is not a proper proceeding on which to raise a question of breach of trust against trustees (*m*).

Determining
a disputed
debt on
originating
summons.

An originating summons should not be taken out to obtain payment of a disputed debt where the dispute turns on a matter of fact, but when the question depends merely on a question of law, it will be decided on an application by originating summons without putting the parties to another proceeding (*n*).

Notice of
intention to
raise Statute
of Frauds.

Notice should be given of intention to raise, on the hearing of the summons, any question arising under the Statute of Frauds (*o*). The notice should be given by letter or affidavit.

Practice in
an adminis-
tration
action.

In order to prevent inconvenient preference in the administration of the assets, as well as to avoid the burden which several suits by several creditors could not fail to bring on the fund to be administered, a Court of Equity always allowed a creditor to sue on behalf of himself and the other creditors of the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator (*p*), or, if assets were admitted, and the debt admitted or proved, has made an immediate decree for payment (*q*). But there is no actual necessity for a creditor to sue on behalf of himself and the other creditors as far as personal estate is concerned (*r*).

A creditor's
action.

A legatee's
action.

Upon the same principle a legatee has always been permitted to sue on behalf of himself and other legatees: and, even under the old practice, a bill has been admitted by a person claiming

(*m*) Kekewich, J., in *Re Weall*, 37 W. R. 779; *Dowse v. Gorton*, [1891] A. C. at p. 202; but see *Re Stuart*, 74 L. T. 546, *ante*, p. 1493. See also *Re Giles*, 43 C. D. 391, as to questions of priority between mortgagees.

(*n*) *Re Powers*, 30 C. D. 291, *ante*, p. 1620. See Ord. LV. r. 3, set out p. 1525.

(*o*) *Re Shearman*, 2 Times Rep. 236.

(*p*) Mitf. Pl. 5th edit. 193. A creditor having *debitum in presenti solvendum in futuro* may maintain such a suit: *Whitmore v. Oxborrow*, 2 Y. & C. C. C. 13. And so may a claimant under a voluntary covenant: *Watson v. Parker*, 6 Beav. 283, note (*n*). After a decree in the suit, the executor cannot do any act to affect the relative rights of creditors: By Sir John Leach, M. R., in *Shewen v. Vandenhorst*, 2 Russ. & M. 75; 1 Russ. & M. 347, S. C.

(*q*) *Woodgate v. Field*, 2 Hare, 211.

(*r*) *Per* Jessel, M. R., *Re Greaves*, *Bray v. Tofield*, 18 C. D. at p. 554; *Re Blount*, 27 W. R. 865. See also *ante*, p. 1591.

under a general description on behalf of himself and the other persons equally entitled under the same description (s).

A creditor who sues *on behalf of himself and all other the creditors* is entitled where the estate proves insufficient for payment of debts, to costs, as between solicitor and client (t), and it will be wise where a creditor is suing to use this particular form of words. The reason for the rule is thus stated by Kindersley, V.-C.: "If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and, therefore, if a creditor has, for the benefit of all the other creditors, instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro ratâ*, should be applied in payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only" (u).

Right of creditor suing on behalf of himself and other creditors to costs:

It is sufficient, if it appears from the title of the statement of claim, that the creditor sues on behalf of all other creditors, although it does not appear on the writ, and the writ need not be amended (v). But it is not sufficient that the fact should appear merely in the body of the statement of claim; it should appear in the actual title (x).

The rule applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin (y).

or where he obtains conduct of action.

Formerly, where a single creditor was seeking to have the real and personal estate of his deceased debtor administered, he had to sue "on behalf of himself and all other the creditors," if the debtor had died intestate or leaving a Will with no devise of real estate to trustees with power to sell and give receipts (z). It has, however, been held that, since the Land

Practice where creditor seeks administration of the real estate.

(s) Mitf. Pl. 5th edit. 194. The legatee of an annuity charged upon residue is entitled to administer: *Wollaston v. Wollaston*, 7 C. D. 58.

(t) *Re Richardson*, 14 C. D. 611; *Re McRea*, 32 C. D. 613.

(u) *Thomas v. Jones*, 1 Dr. & Sm. 134, 136; cited and approved of by Kay, J., in *Re McRea*, 32 C. D. 613, 615.

(v) *Eyre v. Cox*, 24 W. R. 137.

(x) *Re Tottenham* (1876), 1 Ch. 628.

(y) *Re Richardson*, 14 C. D. 611.

(z) *Worraker v. Pryor*, 2 C. D. 109; *Re Doyle*, 5 C. D. 540. See also *Re Vincent*, 26 W. R. 94.

Transfer Act, 1897, this is no longer necessary in cases to which that Act applies (a).

Remedy in
the County
Court.

Creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next of kin, can bring actions against executors or administrators in the County Court for an account or administration.

Limit of
jurisdiction
in the
County
Court.

The jurisdiction of the County Court is, for this purpose, limited to cases, in which the personal or real, or personal and real estate, against or for an account or administration of which the demand may be made does not exceed in amount or value the sum of 500*l.* (b).

Execution
of trusts.

The County Court has also jurisdiction in claims for the execution of trusts, in which the trust estate or fund does not exceed in amount or value 500*l.* (c).

Transfer
from the
Chancery
Division to
the County
Court.

The Chancery Division has concurrent jurisdiction in the above matters with the County Court. Where an action is commenced in the Chancery Division which might have been commenced in the County Court, any of the parties can apply for its transfer to the County Court, and the Judge has power on such an application, or without such an application, to make an order transferring the action to the County Court, and thereupon the action proceeds in the County Court as if originally brought there (d). It has not been the practice to make such an order of transfer without special reason (e).

Staying
proceedings
in another
action.

There is nothing to prevent other creditors or legatees from instituting a second action for administration; and as it is possible that, before the order, the litigating creditor may stop his action, the Court permits the actions to go on together until a decree in one of them is obtained (f). So, also, in the case of

(a) *Re James*, [1911] 2 Ch. 348.

(b) 51 & 52 Vict. c. 43, s. 67, sub-s. 1.

(c) 51 & 52 Vict. c. 43, s. 67, sub-s. 2. In general the action must be commenced in the Court within the district of which any of the defendants dwell or carry on business, or live in, or in the Court of the district in which the defendants or one of them dwell or carried on business at any time within six calendar months next before the commencement of the action: 51 & 52 Vict. c. 43, s. 74. See further as to equitable remedies against executors and administrators in the County Court, *post*, Chap. IV.

(d) 51 & 52 Vict. c. 43, s. 69.

(e) *Picard v. Hine*, 18 L. T. 704.

(f) *Woodgate v. Field*, 2 Hare, 211, 214. As to staying proceedings in the other suits, see *Hawkes v. Barrett*, 5 Madd. 17; *Turner v.*

several persons claiming under the same general description. And when the usual order has been obtained in one of such actions, if another action is instituted, praying no further relief than might be had in the former action, the parties to such former action ought to apply to have the proceedings in the latter action transferred to the Judge in whose Court the proceedings under the decree are pending, and to have the second action stayed by him (*g*); otherwise the costs of it may be dealt with as costs in their action (*h*).

On the application to stay the proceedings, the question is, whether the action which is sought to be stayed asks something more than could be obtained under the existing order (*i*). As, for instance, where more complete and beneficial relief is sought or can be obtained in the second suit (*k*), or further questions are raised, such as wilful default or breaches of trust (*l*). Even where the second suit goes further than the first, proceedings in the second action have been stayed on the executor or administrator undertaking not to object to any additions to the decree in the first action which the Judge may think fit to add in chambers (*m*).

Question on applications to stay.

The ordinary practice is to allow the action in which a decree has first been obtained to proceed and to stay the other action (*n*).

General practice.

If the decree has been "snapped," or unfairly obtained (*o*), or if the second action has been improperly instituted (*p*), the

Where the decree has been wrongly obtained.

Dorgan, 12 Sim. 504; *Reid v. Territt*, 1 Coll. 1; *Dryden v. Foster*, 6 Beav. 146; *Frowd v. Baker*, 4 Beav. 76; *Portarlington v. Damer*, 2 Phil. C. C. 262; *Duffort v. Arrousmith*, 7 De G. M. & G. 434; *Harris v. Gandy*, 1 De G. F. & J. 13.

(*g*) As to applications to stay where one of the actions is in the Palatine Court, see *Re Williams*, W. N. (1882) p. 6; *Townsend v. Townsend*, 23 C. D. 100; *Wynne v. Hughes*, 26 Beav. 377; *Re Longdendale Cotton Co.*, 8 C. D. 150.

(*h*) *Therry v. Henderson*, 1 Y. & C. C. C. 481.

(*i*) *Rigby v. Strangways*, 2 Phil. C. C. 175; *Rump v. Greenhill*, 20 Beav. 512; *Plunkett v. Lewis*, 11 Sim. 379. See also *Suisse v. Lowther*, 2 Hare, 424; *Gwyer v. Peterson*, 26 Beav. 83; *Hoskins v. Campbell*, 2 Hemm. & Miller, 42; *Belcher v. Belcher*, 2 Dr. & Sm. 444.

(*k*) *Re McRae*, 25 C. D. 16; *Bulgen v. Sage*, 3 M. & Cr. 683; *Taylor v. Southgate*, 4 M. & Cr. 203; *Underwood v. Jee*, 1 Mac. & G. 276; *Pickford v. Hunter*, 5 Sim. 122.

(*l*) *Zambaco v. Cassavelli*, L. R. 11 Eq. 439.

(*m*) *Gwyer v. Peterson*, 26 Beav. 83; *Matthews v. Palmer*, 11 W. R. 610; *Van Bunan v. Piffard*, 13 W. R. 425.

(*n*) Dan. Ch. Pr. 8th edit. 1645.

(*o*) *Harris v. Gandy*, 1 D. F. & J. 13.

(*p*) *Frost v. Ward*, 2 D. J. & S. 70.

Court will either not stay the other action or will give the conduct of the action in which the decree has been made, to the plaintiff in the other action (*q*).

Conduct of the proceedings.

Where the first action is stayed because a decree has been made in a later action, the conduct of the second action will usually be given to the plaintiff in the first action (*r*); it makes no difference in this respect, that one of the actions is in the Palatine Court (*s*). The Court will, of course, depart from this rule, on the ground of the special circumstances of the case; for instance, where the Court comes to the conclusion that the object of the plaintiff in the first action is not the *bonâ fide* administration of the estate (*t*), or where he is a creditor whose claim is *bonâ fide* disputed (*u*).

Partial stay.

In some cases the first action will be partially stayed, and liberty given to the plaintiff in the first action to prove in the second action for what he may eventually establish in the first (*v*).

Transfer of actions against executors or administrators where an administration order has been made.

Where an order has been made by any Judge of the Chancery Division, for the administration of the assets of any testator or intestate, the Judge in whose Court such administration is pending has power, without any further consent, to transfer to himself any cause or matter pending in any other Court or Division. brought or continued by or against the executors or administrators of the testator or intestate (*x*). In dealing with a creditor's action, when transferred to him, he will be governed by the same principles as formerly governed the Court in staying proceedings in such actions.

The application, how made.

The application for transfer of an action brought or continued against an executor or administrator, after an administration order, can be made *ex parte* by any party to either action (*y*). It must be made to the Judge who made the administration order (*z*).

(*q*) *Rhodes v. Barret*, L. R. 12 Eq. 479.

(*r*) *Zambaco v. Cassavelli*, L. R. 11 Eq. 439; *Kenyon v. Kenyon*, 35 Beav. 300; *Belcher v. Belcher*, 2 Dr. & Sm. 444; *Frost v. Frost*, 2 D. J. & S. 70.

(*s*) *Re Swire*, 21 O. D. 647; *Townsend v. Townsend*, 23 C. D. 100.

(*t*) *Re Swire*, *supra*.

(*u*) *Re Ross*, [1907] 1 Ch. 482.

(*v*) *Dryden v. Foster*, 6 Beav. 146; *Re Smith's Estate*, 33 L. T. N. S. 804; *Crowe v. Russell*, 4 O. P. D. 186.

(*x*) R. S. C. Ord. XLIX. r. 5. For transfer in other cases, see Ord. XLIX.

(*y*) Dan. Ch. Pr. 8th edit. 1598.

(*z*) R. S. C. Ord. XLIX. r. 5.

This power of transfer takes the place of the old practice, which was, after a decree for administration had been made, for the Judge of the Court of Chancery making the administration decree, to restrain proceedings by other creditors against the executor or administrator by granting injunctions against such other creditors.

The action to be transferred must be one brought against the executor *quâ* executor, and not one for which the executor is personally liable (*a*).

The fact that a claim against the executor personally is joined with a claim against him as executor does not prevent the transfer of the action (*b*).

The old practice was that a plaintiff at law was entitled, unless his claim proved unfounded (*c*), upon the injunction being granted, to his costs of the action up to the time when he had notice of the decree (*d*). And if the creditor commenced his action at law before bill filed, and then discontinued it, and came in under the decree, he would be entitled to prove his costs at law, in addition to his debt (*e*). He was also entitled to the costs of the motion to restrain him from suing at law (*f*). But he was not allowed the costs of further proceedings at law after actual notice of the decree (*g*), nor in such case his costs of the motion to restrain his proceedings (*h*). If, however, the executor took any steps in the action after the plaintiff at

Right of
creditor
bringing
second action
to costs.

(*a*) *Chapman v. Mason*, 40 L. T. 678. See also *Re Timms*, 26 W. R. 692; but see *Re Pimm*, *infra*.

(*b*) *Re Pimm*, [1916] W. N. 202.

(*c*) *King v. King*, 34 Beav. 10.

(*d*) *Dyer v. Kearsley*, 2 Meriv. 483, note to *Terrewest v. Featherby*; *Paxton v. Douglas*, 8 Ves. 520; *Ratcliffe v. Winch*, 16 Beav. 576. In *Drewry v. Thacker*, 3 Swanst. 541, Lord Eldon said that the usual form in which the order for the injunction was drawn (*i.e.*, "on payment of costs") was improper; inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the assets, be unable to obtain it in time.

(*e*) *Goate v. Fryer*, 3 Bro. C. C. 23.

(*f*) *Jones v. Jones*, 5 Sim. 678. But see *Anon.*, 2 Sim. & Stu. 424.

(*g*) *Paxton v. Douglas*, 8 Ves. 521; *Curre v. Bowyer*, 3 Madd. 456; *Jones v. Brain*, 2 Y. & C. O. C. 170.

(*h*) *Curre v. Bowyer*, 3 Madd. 456; *Jones v. Brain*, 2 Y. & C. O. C. 170. See *Hayward v. Constable*, 2 Y. & Coll. 43; *Moore v. Prior*, *ibid.* 375. He may be ordered to pay these costs, if, after bringing in his claim under the decree, he proceeds with his own suit: *Beauchamp v. Lord Huntley*, Jacob, 546; *Gardner v. Garrett*, 20 Beav. 469; notwithstanding the suit be in a foreign Court: *Graham v. Maxwell*, 1 Mac. & G. 71. He may set off such costs against his costs incurred before notice of the decree: 20 Beav. 469.

law had notice of the decree, the latter would be allowed all his costs at law and also those of the motion for the injunction (*i*). The practice is now substantially the same as before the Judicature Acts (*j*).

Time for application.

With respect to the time within which the injunction should be applied for, it was observed by Lord Lyndhurst (*k*), that any delay in the application before judgment would, in most cases, properly resolve itself into a mere question of costs.

Transfer to bankruptcy.

By sect. 130, sub-sect. 3, of the Bankruptcy Act, 1914 (*l*), where proceedings have been commenced in any Court for the administration of the estate of a deceased debtor, such Court can, on proof that the estate is insolvent, transfer the proceedings to the Court of Bankruptcy.

A creditor before applying for the transfer of an insolvent estate into bankruptcy must, it would appear, have proved his debt (*m*).

The transfer can be ordered after a judgment for administration has been made (*n*), but not if there are difficult questions of law to be determined or the proceedings are far advanced (*o*).

Transfer discretionary.

The exercise of this power of transfer is discretionary (*p*), and the mere fact that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which rights would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer (*q*).

An order for administration cannot be made in the absence of a personal

An estate cannot be administered in a Court of Equity in the absence of a personal representative (*r*). And, consequently, if it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there

(*i*) *Turner v. Connor*, 15 Sim. 630.

(*j*) See Ord. XLIX. r. 5; Dan. Ch. Pr. 8th edit. 1645.

(*k*) *Rouse v. Jones*, 1 Phil. Ch. C. 464.

(*l*) 4 & 5 Geo. V. c. 59, s. 130 (3).

(*m*) *Re Weaver*, 29 C. D. 236.

(*n*) *Re York*, 36 C. D. 233; *Senhouse v. Mawson*, 52 L. T. 745; *Re Briggs*, 7 Times Rep. 572.

(*o*) *Re Kenward*, 94 L. T. 277.

(*p*) *Re Baker*, 44 C. D. 262; *Re Weaver*, 29 C. D. 236.

(*q*) *Re Baker*, *supra*. But see *Re York*, 36 C. D. 233. And see *Re Rhoades*, [1899] 2 Q. B. 347.

(*r*) *Lowry v. Fulton*, 9 Sim. 104; *Dowdeswell v. Dowdeswell*, 9 C. D. 294.

must be a personal representative of it before the Court (s). Accordingly, on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix deceased, it was held by Lord Cottenham, C., that an allegation that all the testator's debts and the other legacies bequeathed by his Will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one which, even if admitted by the defendant, the Court would not take his word for (t).

representative of the deceased.

In *Glass v. Oxenham* (u), it was held that if a bill were brought against an executor, during whose infancy the Will appointed an executor *durante minore ætate*, the latter must be made a party, unless the former had received all the testator's personal estate from the hands of the temporary executor, upon an account between them.

In *Holland v. Prior* (x), it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V.-C., that the executor of an administratrix, who had received assets of her intestate, might and ought to be made a defendant in a suit instituted by a creditor of the intestate. And in *Hall v. Austin* (y), Knight Bruce, V.-C., appears to have acceded to the proposition that, as a general rule, where there are several executors who have acted and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate, making the surviving executors alone parties.

Where the executor of a deceased personal representative is a necessary party.

It is necessary to join the representative of a deceased executor if a general account of the trust estate, on the footing of wilful neglect and default, is required (z).

The representative of a deceased executor must be joined where wilful default alleged.

The representative of a deceased executor need not be joined in an administration action, if it is not sought to charge the estate of the deceased executor, or if an account is waived as

(s) *Penny v. Watts*, 2 Phil. Ch. O. 153; *Cary v. Hills*, L. R. 15 Eq. 79; *Rowell v. Morris*, L. R. 17 Eq. 20. But see *contra*, *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 536; *Re Lovett*, 3 C. D. 198.

(t) *Penny v. Watts*, 2 Phil. Ch. O. 149.

(u) 2 Atk. 121.

(x) 1 M. & K. 237. See also *Hall v. Austin*, 2 Coll. 570.

(y) 2 Coll. 570. See also *Coppard v. Allen*, 2 D. J. & S. 173. But see *Masters v. Barnes*, 2 Y. & C. O. C. 616.

(z) *Coppard v. Allen*, 2 D. J. & S. 173.

against his estate (*a*). The old form of pleading, where the representatives of a deceased executor were not joined, was to allege that the deceased executor, or his representative, had duly accounted to the surviving executors (*b*); but such an allegation appears to have been unnecessary (*c*), and under the present procedure, as the bulk of administrations are without pleadings, there would be no opportunity of making such an allegation.

Adminis-
trator of
deceased
executor and
executor *de
son tort* not
sufficient.

The administrator of a deceased executor does not sufficiently represent the estate of which his intestate was executor for the purpose of making an administration decree (*d*), and the better opinion seems to be that an executor *de son tort* alone is not sufficient (*e*).

Where fund
converted or
specially
appropriated.

If, indeed, an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of residue, and has assumed the character of a trust fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of, the *cestui que trust*,—it may not be necessary that the *cestui que trust* should bring before the Court the personal representative of the testator in a suit to recover that part of the estate (*f*).

Foreign
executor,
&c.

There has already been occasion to point out that in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court in this country (*g*).

(*a*) *Masters v. Barnes*, 2 Y. & C. C. C. 616.

(*b*) *Adams v. Barry*, 2 Y. & C. C. C. 167.

(*c*) *Wilson v. Todd*, 1 M. & Cr. 42.

(*d*) *Barber v. Walker*, 15 W. R. 728.

(*e*) *Rowsell v. Morris*, L. R. 17 Eq. 20. But see *contra*, *Re Lovett*, 3 C. D. 198; *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534; *Blewitt v. Blewitt*, Yo. 541.

(*f*) *Bond v. Graham*, 1 Hare, 482, 484. See also *Arthur v. Hughes*, 4 Beav. 506; and Lord Cottenham's judgment in *Penny v. Watts*, 2 Phil. Ch. C. 153, 154. But see *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534.

(*g*) *Ante*, p. 264 *et seq.* In *Anderson v. Caunter*, 2 M. & K. 763, A., one of the executors of the Will of B., who died in India, proved the Will, and possessed the testator's assets in India. The widow and executrix of A. proved her husband's Will, and possessed his assets in India, and, having afterwards come to England, she was made a party to a suit for the administration of B.'s estate; and Sir J. Leach, M. R., held that it was not necessary that an adminis-

Where there is no general personal representative, but a special representative limited to the subject of the suit has been appointed by the Probate Court, the limited administrator does not sufficiently represent the estate of the deceased where a general administration is required (*h*).

Administra-
tor *ad litem*
not sufficient.

After the usual administration judgment or order, every creditor has an interest in the suit (*i*), and is in a sense deemed to be before the Court; yet, until such order, the plaintiff is *dominus litis*, so that he may deal with the action as he pleases; and he may settle the matter with the executor, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings (*k*). And indeed the Court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of the action (*l*).

Until decree
the plaintiff
is *dominus*
litis.

The general rule is, that, inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or a residuary legatee, or the next of kin, as a party to an action against the executor or administrator for an account of the personal estate, however interested such persons may be to contest the demand which has occasioned the suit (*m*). Special circumstances, how-

Who may be
made co-
defendants
with execu-
tors, &c.

trator of A.'s estate in England should be also a party to this suit. But see the observations of Lord Cottenham on this decision in *Tyler v. Bell*, 2 M. & Cr. 89, 110. See also Story's Confl. of Laws, ch. xiii. s. 513, note (1), where it is said that *Anderson v. Caunter* seems not a sound authority: *Maclean v. Dawson*, 27 Beav. 21; *Flood v. Patterson*, 29 Beav. 295.

(*h*) See *ante*, p. 424, note (*k*); *Dowdeswell v. Dowdeswell*, 9 C. D. 294.

(*i*) See *Sterndale v. Hankinson*, 1 Sim. 399, 400; *Cook v. Bolton*, 5 Russ. 282; *Brown v. Lake*, 2 Coll. 620; *Smith v. Guy*, 2 Phil. Ch. C. 159; *Harpur v. Buchanan*, [1919] 1 Ir. R. 1. But see *Re Greaves*, 18 C. D. 551. It would appear that under the old practice only creditors whose debts were due at the death of the testator were in strictness permitted to come in under the decree; the present practice is to admit all creditors to come in whose debts have become due before the date of the report: *Thomas v. Griffith*, 2 De G. F. & J. 555, *per* Turner, L. J. It seems also that where an account of debts has been ordered to be taken, all persons having any demands upon the estate in respect of any liabilities, whether certain or contingent, should send in claims: Dan. Ch. Pr. 8th edit. p. 897.

(*k*) *Woodgate v. Field*, 2 Hare, 213; *Wood v. Westall*, 1 Younge, 305.

(*l*) *Woodgate v. Field*, 2 Hare, 213; *Pemberton v. Topham*, 1 Beav. 316; *Holden v. Kynaston*, 2 Beav. 204.

(*m*) *Brown v. Douthwaite*, 1 Madd. 446.

Persons
wrongfully
taking the
dead man's
property.

ever, have been permitted to justify the relaxation of this rule (*n*).

Again, the established rule is, that in ordinary cases, persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to an action against the executor: For regularly there can be no action against the debtor but by the executor, who has the right both at law and in equity: If the executor be solvent he may even release a debtor, and neither a creditor nor a residuary legatee can bring any action against that debtor: There must be collusion or insolvency, or some special case: The Court will interfere, if there is such special case: as collusion or insolvency; and then the action may be brought against both the debtor and the executor (*o*). And the general principle on which a debtor to the estate cannot be made a defendant to an action by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case be shown, has been held to apply equally to the case of a creditor overpaid by the executor: that is, if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in a debtor (*p*).

Surviving
partners of
deceased.

But this rule has been relaxed in the case of surviving partners of the deceased: whom it is allowable to make parties with the executor: in order, it is said, that the plaintiff may have an account of the personal estate entire (*q*). Accordingly, in *Bousher v. Watkins* (*r*), it was held by Sir John Leach, M. R., that residuary legatees might maintain a bill for an account

(*n*) *Lord Hertford v. Zichi*, 9 Beav. 11. See now R. S. C. Ord. XVI. r. 8.

(*o*) *Newland v. Champion*, 1 Ves. Sen. 105; *Utterson v. Mair*, 2 Ves. 95; *Doran v. Simpson*, 4 Ves. 651; *Troughton v. Binkes*, 6 Ves. 573; *Alsager v. Rowley*, 6 Ves. 748; *Beckley v. Dorrington*, cited by Lord Eldon, *ibid*. 749; *Benfield v. Solomons*, 9 Ves. 86; *Burroughs v. Elton*, 11 Ves. 29; *Consett v. Bell*, 1 Y. & C. C. C. 569; *Lancaster v. Evors*, 4 Beav. 158; *Baddeley v. Curwen*, 2 Coll. 151; *Barker v. Birch*, 1 De G. & Sm. 376. As to whether a refusal by the executor to sue the debtor is sufficient, see the case last cited. The special circumstances which will authorise making the debtor a party are not confined to collusion or insolvency: *Meldrum v. Scorer*, 56 L. T. 471; *Consett v. Bell*, 1 Y. & C. C. C. 569; 1 De G. & Sm. 376; *Stainton v. Carron Co.*, 11 Beav. 146; *Saunders v. Druce*, 3 Drew. 140.

(*p*) *Alsager v. Rowley*, 6 Ves. 748.

(*q*) *Newland v. Champion*, 1 Ves. Sen. 106, by Lord Hardwicke.

(*r*) 1 Russ. & M. 277.

against the executor and the surviving partner of the testator, although collusion between the executor and the surviving partner was neither charged nor proved (*s*). But upon the examination of the authorities (*t*), it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases seem to go to this extent,—that such an action may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution of the rights of the parties interested in the estate against the surviving partners (*u*).

The mere refusal of a legal personal representative to sue for the recovery of outstanding assets, is not, in the absence of special circumstances, sufficient to justify a residuary legatee or next of kin, in suing the legal personal representative and the alleged debtor to the estate (*x*).

Refusal of
personal re-
presentative
to sue.

Where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue and to compel payment from the residuary legatee of his debt, so far as the residue will extend, and the executor need not be a defendant to the action (*y*). So where

Following
assets.

(*s*) His Honor, in the previous case of *Gedge v. Traill*, 1 Russ. & M. 281, note, overruled a demurrer to a creditor's bill, which had made the co-partners of the deceased testator co-defendants with his executor, upon the ground that the retaining of assets by a stranger with consent of the executor amounted to collusion. In *Davies v. Davies*, 2 Keen, 534, Lord Langdale, M. R., said that the decision of *Bowsher v. Watkins* is far from establishing the general proposition that in every case a bill may be filed against an executor and a surviving partner of the testator, without charging and proving fraud or collusion. See also *Law v. Law*, 2 Coll. 41; *Cropper v. Knapman*, 2 Y. & Coll. 338.

(*t*) *Bowsher v. Watkins*, 1 Russ. & M. 277; *Gedge v. Traill*, 1 Russ. & M. 281; *Davies v. Davies*, 2 Keen, 534; *Law v. Law*, 2 Coll. 41; *Cropper v. Knapman*, 2 Y. & Coll. 338; commented on in *Yeatman v. Yeatman*, 7 C. D. 210; *Beningfield v. Baxter*, 12 App. Cas. 167.

(*u*) *Travis v. Milne*, 9 Hare, 141, 150, by Turner, V.-C. In *Stainton v. Carron Co.*, 18 Beav. 146, Romilly, M. R., approved of this statement of the general principle, and held that it did not apply to such a partnership as a joint stock company. See also *Yeatman v. Yeatman*, 7 C. D. 210. When a member of a partnership dies insolvent, and an order is made under sect. 125 of the Bankruptcy Act, 1883, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated: *Re Greaves*, [1904] 2 K. B. 493.

(*x*) *Yeatman v. Yeatman*, 7 C. D. 210.

(*y*) *Hunter v. Young*, 4 Ex. D. 256. See also *Glegg v. Rowland*, L. R. 3 Eq. 368; *Harrison v. Kirk*, [1904] A. C. 1, 7.

an undischarged bankrupt died leaving property acquired after the bankruptcy, and his administrator, without notice of the bankruptcy, distributed the property among the next of kin, they were liable to refund what they had received (z).

Death of one of several co-plaintiffs in a creditor's action.

The death of one of several co-plaintiffs in a creditor's suit did not under the old practice cause the suit to abate (a), but his personal representatives could obtain an order of revivor if the dead creditor represented a different class of creditors from that represented by his co-plaintiff, at any rate if the dead plaintiff died after decree (b). So now under the Judicature Act the action will not abate, by reason of Ord. XVII. r. 1, and any necessary parties may be added under Rule 4 of the same Order.

Binding absent persons.

Although it has been the practice of the Court in administration actions to entertain actions by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to exonerate the executor or administrator for payment of assets pursuant to its order, yet such a decree is not absolutely binding upon the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims (c), and have been guilty of no laches (d). Although such creditors have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatee or distributees who have received it (e).

When the interests of persons not parties to the action are bound by it.

It is important to understand how the interests of persons affected by an account or inquiry directed in an administration action may be bound when they are not actually parties to the action.

There seem to be four ways in which such interests will be bound:—

1. The Court can, under Ord. XVI. r. 40, direct that such persons shall be served with notice of the judgment or order.

After such notice the persons served are bound by the pro-

(z) *Re Bennett*, [1907] 1 K. B. 149.

(a) *Body v. Kent*, 1 Mer. 364; *Burney v. Morgan*, 1 Sim. & Stu. 358.

(b) *Burney v. Morgan*, *supra*.

(c) *David v. Frowd*, 1 Mylne & K. 200. See *Anon.*, 9 Price, 210.

(d) *Sawyer v. Birchmore*, 1 Keen, 391; *S. C.*, 2 M. & Cr. 611. See also *Cattell v. Simons*, 8 Beav. 143.

(e) Story on Equity Plead. Ch. iv. s. 106. An executor suing on behalf of himself and all other creditors can none the less retain his own debt: *Ex parte Campbell*, 16 C. D. 198.

ceedings, in the same manner as if they had originally been parties, and are at liberty to attend the proceedings (f) upon entering an appearance in the Central Office in the same manner as a defendant entering an appearance (g). Any person so served may, within one month after such service, apply to the Court or a Judge to discharge, vary or add to the judgment or order (h).

2. "Where there are numerous parties having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested" (i). If an order made in such an action is intended to bind absent parties the Court will make a "representation order" in the form "it appearing that the residuary legatees (or whatever the class may be) are numerous, and that A. is one of such class, order that A. do defend in the cause (or matter) on behalf or for the benefit of all persons so interested" (k).

Numerous persons having the same interest.

Where a representation order is required the writ must be indorsed in accordance with Ord. III. r. 4, and show that the plaintiff sues or the defendant is sued in a representative capacity (l).

Claim for a representation order:

"If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity . . . he shall deny the same specifically" (m).

3. "In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense, or for some other reason,

representative of a class.

(f) Ord. XVI. r. 40.

(g) Ord. XVI. r. 41.

(h) Ord. XVI. r. 40.

(i) Ord. XVI. r. 9.

(k) See judgment of Kay, J., in *May v. Newton*, 34 C. D. 347, where the whole subject is very fully discussed.

(l) "If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show . . . in what capacity the plaintiff or defendant sues or is sued": Ord. III. r. 4. See forms in Appendix A. Part III. Sect. VII. to R. S. C.

(m) Ord. XXI. r. 5.

it will be convenient to have the questions of construction determined before such heir-at-law, next of kin or class, shall have been ascertained by means of inquiry, or otherwise, the Court or a Judge may appoint some one or more persons to represent such heir-at-law, next of kin or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin or class, so represented (*n*).

Trustees, executors, &c., may sue and be sued as representing estate.

4. " Trustees, executors, and administrators, may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties " (*o*).

It is obvious, however, that where the trustees, executors, or administrators, are the accounting parties, and the question is one of accounts, they do not sufficiently represent the estate to bind absent parties (*p*).

Costs of persons appearing under a representation order.

In the case of *Re Davies* (*q*), Kekewich, J., held that he had power to give costs, as between solicitor and client, to persons not actually parties to the proceedings, but only there by virtue of a representation order under Ord. XVI. r. 32.

A residuary legatee; a next of kin; a legatee interested in a legacy charged upon real estate; a person interested in the proceeds of real estate directed to be sold; or a residuary devisee or heir; if entitled to a judgment or order for administration of the estate of a deceased, may have the same without serving the other persons interested (*r*), subject to the right of the Court to require any other to be made a party (*s*); but it appears that an order made in such case will not be binding on other beneficiaries unless they are served with it under Ord. XVI. r. 40 (*t*), or a representation order has been made (*u*).

(*n*) R. S. C. Ord. XVI. r. 32; *ante*, p. 1528.

(*o*) R. S. C. Ord. XVI. r. 8.

(*p*) See Kay, J., in *May v. Newton*, 34 C. D. 349.

(*q*) W. N. (1891), p. 104; 64 L. T. 824.

(*r*) Ord. XVI. rr. 33—35; *ante*, pp. 1528, 1529.

(*s*) Ord. XVI. r. 39; *ante*, p. 1529.

(*t*) *Ante*, p. 1529.

(*u*) See *May v. Newton*, *supra*.

Although suits in equity are not within the words of the Statute of Limitations, 21 Jac. I. c. 16, yet they are within the spirit and meaning of it; and, therefore, upon all *legal* demands, the Courts of Equity are *bound* to yield obedience to its provisions (*x*); and as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years by analogy to that statute (*y*).

Defence:
Statute of
Limitations.

Subject to the provisions of the Trustee Act, 1888, the Statute of Limitations (21 Jac. I. c. 16) does not run against a trust (*z*). Accordingly, a trust created by Will upon the *real* estate for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime (*a*), though a mere charge is not sufficient for this purpose (*b*). Such a trust does not, however, revive a debt on which the statute had taken effect before the Will came into operation, viz., before the testator's death (*c*). But a trust or charge by Will upon the *personal* estate does not prevent the operation of the Statute of Limitations: for the law vests the

Effect of a
trust for
creditors or
beneficiaries.

(*x*) *Hovenden v. Annesley*, 2 Scho. & Lef. 630, 631; *Foley v. Hill*, 1 Phil. Ch. C. 399; *Burdick v. Garrick*, L. R. 5 Ch. 233, 240; *Re Greaves*, 18 C. D. 551, 554; *Re Sharpe*, [1892] 1 Ch. 154; *Re Bennett*, *ibid*.

(*y*) *Re Greaves*, *supra*. In *Tatam v. Williams*, 3 Hare, 357, a bill by surviving partners against the executors of a partner, who died thirteen years before the institution of the suit, for an account of his partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram, V.-C., with costs, on the ground of lapse of time. Again, in *Baker v. Read*, 18 Beav. 398, where a bill had been filed after seventeen years to set aside a purchase of the testator's estate by his executor at an undervalue, Romilly, M. R., refused relief, although his Honour added that if the transaction had been fresh, he should have set it aside without a moment's hesitation. See further as to *laches* and lapse of time being a bar in equity, *Portlock v. Gardner*, 1 Hare, 594; *Browne v. Cross*, 14 Beav. 105; *Sibbering v. Balcarras*, 3 De G. & Sm. 735; *Wright v. Vanderplank*, 2 K. & J. 1; *Aspland v. Watte*, 20 Beav. 474; *Mills v. Drewitt*, 20 Beav. 632; *Hartwell v. Colvin*, 16 Beav. 140; *Bullock v. Downes*, 9 H. L. C. 1; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, 210.

(*z*) *Hollis's Case*, 2 Ventr. 345; *Hargreaves v. Michell*, 6 Madd. 326; *Barker v. Martin*, 5 Sim. 380; *Wedderburn v. Wedderburn*, 2 Keen, 722; *Dickenson v. Lord Holland*, 2 Beav. 310; *Obee v. Bishop*, 1 De G. F. & J. 137; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514.

(*a*) *Burke v. Jones*, 2 V. & B. 275; *Hughes v. Wynne*, 1 Turn. & R. 307; *Hargreaves v. Michell*, 6 Madd. 326; and see *Re Raggi*, [1913] 2 Ch. 206 (mixed fund).

(*b*) *Dickinson v. Teasdale*, 1 D. J. & S. 52; *Jacquet v. Jacquet*, 27 Beav. 332; *Cunningham v. Foot*, 3 App. Cas. 974.

(*c*) *Burke v. Jones*, 2 V. & B. 275; *Hargreaves v. Michell*, 6 Madd. 326; *O'Connor v. Haslam*, 5 H. L. C. 170.

personal estate of the deceased in his executors or administrators, as a fund for the payment of his debts, and he cannot, by his Will, create a special trust for that purpose: Consequently, such a trust has no legal operation (*d*). The same principle would now apply in the case of such real estate of a testator, dying since the Land Transfer Act, 1897, as becomes vested, under sect. 1 of that Act, in his personal representatives, and which under sect. 2 (3) becomes liable for payment of his debts as if it were personal estate, although the order in which his real and personal assets are applicable towards their payment is not affected by the Act (*e*). But, notwithstanding the Land Transfer Act, 1897, a charge of debts on real estate is not nugatory since it has the effect of bringing the debts within the Real Property Limitation Act, 1874, s. 8, so that as against the real estate the period of limitation is twelve years (*f*). Where a testator, dying before the operation of the last-mentioned Act, directed his debts to be paid out of his real and personal estate, and afterwards provided that, if his personal estate should fall short in paying his debts, his executors should have power to enter into the receipt of the rents of his freehold, until the same should be wholly paid off; it was held that, notwithstanding the personal estate was sufficient for payment of the debts, a trust had been created for payment of the debts out of his realty, so as to prevent the operation of the Statute of Limitations; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate (*g*).

(*d*) *Scott v. Jones*, 4 Cl. & F. 382, in which case the House of Lord affirmed the judgment of Sir John Leach, and reversed that of Lord Brougham, 1 Russ. & M. 255. See also accord. *Freaker v. Craneheldt*, 3 M. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55.

(*e*) 60 & 61 Vict. c. 65.

(*f*) *Re Balls*, [1909] 1 Ch. 791; and see *Re Kempster*, [1906] 1 Ch. 446.

(*g*) *Crallan v. Oulton*, 3 Beav. 1; *Moore v. Petchell*, 22 Beav. 172. Where executors in whom the legal estate is vested under their testator's Will are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease, but after twenty years he should make such inquiry: *Sabin v. Heape*, 27 Beav. 533; *Re Tanqueray-Willaume and Landau*, 20 C. D. 465. And the same principle would no doubt be applicable to the case of executors selling under the powers of the Land Transfer Act, 1897. For the rule as to leaseholds, see *Re Whistler*, 35 C. D. 561; *Re Venn and Furze*, [1894] 2 Ch. 101; *Re Verrell*, [1903] 1 Ch. 65. And see *ante*, p. 696.

By the Real Property Limitation Act, 1874 (*h*), s. 8, it is enacted that after the 1st January, 1879, "no action or suit, or *other proceeding* shall be brought to recover any sum of money secured by any mortgage, judgment (*i*), or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or *any legacy* (*j*), but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (*k*), unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment (*l*) of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknow-

Real
Property
Limitation
Act, 1874.

(*h*) 37 & 38 Vict. c. 57.

(*i*) See *Watson v. Birch*, 15 Sim. 523. This section applies to judgments generally, and is not restricted to judgments which operate as charges on land: *Hebblethwaite v. Peever*, [1892] 1 Q. B. 124; *Jay v. Johnstone*, [1893] 1 Q. B. 25, affirmed in C. A. [1893] 1 Q. B. 189.

(*j*) Sect. 40 of the statute 3 & 4 Will. IV. c. 27, which corresponded to the above provision was held to apply to legacies payable out of personal estate as well as to legacies charged on real estate: *Sheppard v. Duke*, 9 Sim. 567; *Bullock v. Downes*, 9 H. L. C. 1, 14. A residue bequeathed by Will is clearly within the statute: *Prior v. Horniblow*, 2 Y. & Coll. 200; *Christian v. Devereux*, 12 Sim. 264; *Portlock v. Gardner*, 1 Hare, 594, 604; *Adams v. Barry*, 2 Coll. 285, 290, 293. But where more than twenty years after the death of the testator, the representative of one of his executors, and the residuary legatee under his Will, filed a bill against the representative of the co-executor to recover residuary assets of the testator, alleged to have been possessed by the co-executor; it was held that the plaintiffs, though barred by the statute as to assets possessed by the executor more than twenty years before the filing of the bill, were not so barred as to assets possessed by him since that time: *Adams v. Barry*, 2 Coll. 290. See also *Bright v. Larcher*, 27 Beav. 130; 4 De G. & J. 608; *Re Johnson*, 29 C. D. 964. Where the right to sue for the legacy as such was barred by the statute, but the executor, who had possessed assets to pay it, died leaving it unpaid, and having charged his estate with his debts, it was held that the legacy could not be claimed under the charge of debts: *Piggott v. Jefferson*, 12 Sim. 26.

A suit to recover a legacy from an executor is within sect. 8 of the Real Property Limitation Act, 1874: *Re Richardson*, [1920] 1 Ch. 423; unless the legacy is vested in him on express trusts. A mere constructive trust by implication from his office will not prevent the statute from being a bar: *Re Davis*, [1891] 3 Ch. 119; *Re Lacy*, [1899] 2 Ch. 149; *Re Mackay*, [1906] 1 Ch. 25. See also *Re Barker*, [1892] 2 Ch. 491. The time runs from the death of the testator: *Waddell v. Harshaw*, [1905] 1 Ir. R. 416.

(*k*) *Re Welch*, [1916] 1 Ch. 375.

(*l*) See *Holland v. Clark*, 1 Y. & C. C. C. 151, as to what is a sufficient acknowledgment. See also *Lord St. John v. Boughton*, 9 Sim. 219; *Taylor v. Holland*, [1902] 1 K. B. 676; *Re Turner*, *infra*.

ledgment, or the last of such payments or acknowledgments, if more than one was given" (*m*).

Money or
legacy
charged upon
land or rent.
37 & 38 Vict.
c. 57, s. 10.

By sect. 10 of the Real Property Limitation Act, 1874: "After the commencement of this Act no action, suit, or other proceeding, shall be brought to recover any sum of money or legacy charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust (*n*), or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust" (*o*). But by sect. 25 (2) of the Judicature Act, 1873: "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations" (*p*).

36 & 37 Vict.
c. 66, s. 25
(2).

Claims by
cestui que
trust against
trustee.

These two sections seem to be inconsistent; but the construction which has been placed upon them is, that the first section applies as between the land charged and the *cestui que trust*, whilst the second one applies as between the trustee and *cestui que trust* (*q*).

Claims on a
trust of land
or rent.

3 & 4
Will. IV.
c. 27, s. 25.

By sect. 25 of the 3 & 4 Will. IV. c. 27, "When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

The benefit of this section is extended to personal estate by virtue of sect. 25, sub-s. 2, of the Judicature Act, 1873.

(*m*) The 40th section of the 3 & 4 Will. IV. c. 27, did not extend to the case of intestacy, but the section was extended to intestacies by sect. 13 of the 23 & 24 Vict. c. 38. By a strange omission, sect. 8 of the 37 & 38 Vict. c. 57, does not extend to intestacies, the result being that legatees are barred by the latter Act after twelve years, and persons claiming under an intestacy will still only be barred by the 23 & 24 Vict. c. 38, after twenty years.

(*n*) *Williams v. Williams*, [1900] 1 Ch. 152.

(*o*) *Re Welch*, [1916] 1 Ch. 375; *Re Turner*, *infra*.

(*p*) See *Re Davis*, [1891] 3 Ch. 119.

(*q*) See *Sutton v. Sutton*, 22 C. D. 511; *Fearnside v. Flint*, 22 C. D. 579; *Hughes v. Coles*, 27 C. D. 231.

By sect. 42 of the 3 & 4 Will. IV. c. 27, "After the 31st December, 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy (r), or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment (s) of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years" (t).

In the construction of the last-mentioned statute, it was held, that an action to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the Will, so that the fund had ceased to bear the character of a legacy, and had assumed that of a trust fund, must be considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and therefore that it was not within the terms of the Act: And in *Watson v. Saul* (u), Wood, V.-C., observed, that the distinction between mere charges and express trusts pointed out by Lord Eldon in *King v. Denison* (v), was the foundation upon which sect. 40 of 3 & 4 Will. IV. c. 27 (see

Fund severed from the general estate.

(r) An annuity given by a Will, forming no charge upon land, but being personal only, is not within this enactment: *Rock v. Callen*, 6 Hare, 531; *Re Ashwell's Will*, Johns. 112.

(s) See note (l), *supra*.

(t) See *Cunningham v. Foot*, 3 App. Cas. 974.

(u) 1 Giff. 188, 196. See also *Re Timmis*, *Nixon v. Smith*, [1902] 1 Ch. 176.

(v) 1 Ves. & B. 260.

now sect. 8 of Real Property Limitation Act, 1874) rested, and that the provisions of that section were never intended to apply to cases of express trusts (x). In the case of *Re Blatchford* (y), Pearson, J., allowed legatees, who had waited for payment of their legacies until a reversionary interest had fallen in, interest on their legacies from one year after the death of the testatrix, such interest largely exceeding six years' arrears. But the recovery of arrears of an annuity charged on land is now limited to six years, even though secured by an express trust. So an annuity charged on real and personal estate whether by express trust or not, is charged on land within the meaning of sect. 42 and six years' arrears only are recoverable against the real estate, and the same limitation applies to the personal estate although there is no statutory bar (z).

An executor *de son tort* can plead the Statute of Limitations (a).

Claims
against the
executor or
administrator
personally.

In *Webster v. Webster* (b), the testator died in 1786, but the Will was not proved by the executor till 1802: Nevertheless, on a bill filed by the creditor against the executor in 1803, a plea of the Statute of Limitations was allowed, because the bill alleged that the defendant had possessed himself of the personal estate previously to 1792, and might, therefore, have been sued as an executor *de son tort*.

Sect. 8 of the
Trustee Act,
1888.

By sect. 8 (1) of the Trustee Act, 1888 (c), "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply":—

Trustee to
have the

(a) "All rights and privileges conferred by any Statute of

(x) *Phillipo v. Munnings*, 2 Mylne & Cr. 309. See also accord. *Dinsdale v. Dudding*, 1 Y. & C. C. C. 265; *Commissioners of Charitable Donations v. Wybrants*, 2 Jones & L. 182, 196, per Sugden, C. of Ireland; *Jacquet v. Jacquet*, 27 Beav. 332; *Snow v. Booth*, 2 K. & J. 132; *Burrowes v. Gore*, 6 H. L. C. 907; *Dickinson v. Teasdale*, 31 Beav. 511; *Proud v. Proud*, 32 Beav. 234; *Thomson v. Eastwood*, 2 App. Cas. 216. A trust created by a testator of his real estate for payment of his debts does not remove from a creditor the consequences arising from his negligence or acquiescence, whether expressed or implied: *Harcourt v. White*, 28 Beav. 303, 309.

(y) 27 C. D. 676.

(z) *Re Turner*, [1917] 1 Ch. 422.

(a) *Doyle v. Foley*, [1903] 2 Ir. R. 95.

(b) 10 Ves. 93.

(c) 51 & 52 Vict. c. 59.

Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him " (d). benefit of any Statute of Limitations.

(b) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies (e), the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(3) "This section . . . shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

An executor can set up his own *devastavit* in order to obtain the benefit of the statute and can plead the Act against a creditor in like manner as an express trustee can plead it against his *cestui que trust*. Where, therefore, an action though in form a common creditors administration action, is in reality an action the whole object of which is to recover money within the meaning of sect. 8 (1), the executor can plead the statute (f).

A claim by a residuary legatee against an executor comes within sect. 8 (1) (g), and is barred after six years, notwithstanding that the Real Property Limitation Act, 1874, s. 8, also applies to such a claim as being a proceeding to recover a legacy. The statute must be pleaded at the trial or when the order for accounts is made; it is too late to raise it after the accounts have been for some time before the Master or on further consideration (h).

(d) *Ibid*.

(e) For instances of this, see *Re Swain*, [1891] 3 Ch. 233; *Re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176; *Re Allsop*, [1914] 1 Ch. 1.

(f) *Re Blow*, [1914] 1 Ch. 233.

(g) *Re Richardson*, [1920] 1 Ch. 423.

(h) *Re Williams*, [1916] 2 Ch. 38.

From when
time runs.

It appears to be now settled, that if time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative is constituted to him: The rule in this respect appears to be the same in equity (*i*) as at law (*j*).

In cases of fraud, or mistake, it has always been held by Courts of Equity that the statute runs from the discovery; because the laches of the plaintiff commences from that date (*k*).

Creditor's
claims.

It was held by Sir Anthony Hart, V.-C., in *Sterndale v. Hankinson* (*l*), that a bill which had been filed by one creditor on behalf of himself and all other creditors, prevented the Statute of Limitations (21 Jac. I.) from being a bar to the claim of another creditor, who had come in under the decree: And his Honour stated that he entertained no doubt that every creditor had, after the filing of the bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent his debt being shut out because the plaintiff had not obtained a decree within the six years (*m*). But in the case of *Re Greaves* (*n*), Sir George Jessel, M. R., stated that creditors had better not rely upon the above decision in the future, and pointed out that the decision in *Sterndale v. Hankinson* depended upon a variety of circumstances, none of which exist at the present time (*o*). And it now appears to be settled that an action for administration brought by one creditor (not on behalf of himself and all other creditors) does not save the claim of another creditor which was barred by the Statute of Limitations before judgment (*p*).

(*i*) *Freak v. Cranefeldt*, 3 Mylne & Cr. 499; *Boatwright v. Boatwright*, L. R. 17 Eq. 71. (*j*) *Ante*, p. 1561.

(*k*) *Brooksbank v. Smith*, 2 Y. & Coll. Ex. 58; *Ecclesiastical Commissioners v. North Eastern Rail. Co.*, 4 C. D. 845, 860. See Kerf on Fraud and Mistake, 5th edit. pp. 16, 366. An executor cannot protect himself by the Statute of Limitations from payment of a debt due from himself to his testator by deferring proof of the Will. The probate will be considered to have relation to the testator's death, and the debt will be treated as assets in the executor's hands at that time: *Ingle v. Richards*, 28 Beav. 366; *ante*, p. 207.

(*l*) 1 Sim. 393, followed in *Harpur v. Buchanan*, [1919] 1 Ir. R. 1.

(*m*) As to this inchoate interest in an administration action, see *Tollner v. Marriott*, 4 Sim. 19; *Watson v. Birch*, 15 Sim. 523; *Franco v. Alvares*, 3 Atk. 342. But see *contra*, *Re Hartley*, 34 C. D. 742, where, however, there was no general administration decree.

(*n*) 18 C. D. 551.

(*o*) See also *Berrington v. Evans*, 1 Y. & Coll. 434; *Tatham v. Williams*, 3 Hare, 347.

(*p*) *Re Greaves*, 18 C. D. 551; but see *Harpur v. Buchanan*, *supra*.

Another creditor will not be permitted in a creditor's action to set up the Statute of Limitations against the party whose claim is the foundation of the judgment (*q*).

An executor's affidavit for probate which includes in the list of the testator's debts a statute-barred debt does not operate as an acknowledgment of the debt so as to take it out of the statute (*r*).

There may be some doubt whether the writ of *ne exeat regno* (which is a sort of mesne process until final judgment to apprehend a person and so prevent him from leaving the realm, unless he has given security for the amount of his debt) (*s*) has not in effect been abolished by the Debtors Act, 1869 (*t*), but as the question does not seem to have been finally determined, it is thought better to preserve some account of the writ and its use.

The writ of *ne exeat regno* has been considered in the nature of equitable bail (*u*), and it was understood, that a Court of Equity proceeded in respect to it, by analogy to the proceedings at law in cases of legal bail (*v*). It is only applicable to claims such as before the Judicature Acts could have been brought forward in Chancery (*w*).

It has been said, that the object of this writ is to obtain security from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail (*x*). But it was settled, that, though a plaintiff, swearing to the balance of an account, might have bail at law, yet the Court of Chancery holding a concurrent jurisdiction upon the head of account, the plaintiff might also have the writ of *ne exeat regno*: And when a creditor files a bill for an account and administration of the assets, if there is a *clear* affidavit of assets received, the Court of Chancery will grant the writ (*y*).

(*q*) Dan. Ch. Pr. 8th edit. 898.

(*r*) *Re Beavan*, [1912] 1 Ch. 196; *Lloyd v. Coote and Ball*, [1915] 1 K. B. 242.

(*s*) Seton's Judgments and Orders, 6th edit. 516.

(*t*) 32 & 33 Vict. c. 62; *Drover v. Beyer*, 13 C. D. 242; *Hands v. Hands*, 43 L. T. 750.

(*u*) *Haffey v. Haffey*, 14 Ves. 261. And see *Sobey v. Sobey*, L. R. 15 Eq. 200. For practice, see Dan. Ch. Pr. 8th edit. p. 1441 *et seq.*

(*v*) *Pannell v. Taylor*, 1 Turn. & Russ. 103. See *Jenkins v. Parkinson*, 2 M. & K. 5. And see now stat. 32 & 33 Vict. c. 62, s. 6, and R. S. C. Ord. LXIX. for the practice under that section.

(*w*) *Drover v. Beyer*, 13 C. D. 242.

(*x*) *Swift v. Swift*, 1 Ball & B. 227.

(*y*) *Jones v. Alaphsin*, 16 Ves. 471. But a residuary legatee can-

Writ of *ne exeat regno* against a married woman.

In *Moore v. Meynell* (z), Lord Cowper ordered a writ of *ne exeat regno* to issue against a married woman, the administratrix of a former husband, who had come to England to get in his property: And Lord Macclesfield afterwards refused to discharge this order (a). And upon the authority of this case, Lord Hardwicke, in *Jerningham v. Glass* (b), where a wife was executrix of a former husband, and her second husband was gone out of the kingdom, granted the writ against her alone. Again, in *Moore v. Hudson* (c) (July, 1821), Sir John Leach, V.-C., granted writs of *ne exeat regno* against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. But in *Pannell v. Taylor* (d) (February 1823), Lord Eldon, after great consideration, decided that a writ of *ne exeat regno* against a *feme covert* executrix or administratrix could not be sustained. A married woman can, however, now be arrested under the provisions of sect. 4, subsect. 3, and sect. 6 of the Debtors Act, 1869 (e).

Attachment against wife executrix.

In *Bunyan v. Mortimer* (f), a bill was filed against a husband and wife in respect of a demand against the wife as executrix: The husband, who was a bankrupt, had appeared for himself and his wife, and had gone abroad, and an attachment had issued against him for want of an answer: And it was held by Sir J. Leach, V.-C., that such an attachment could not be

not have a writ of *ne exeat regno* against a debtor of the testator on the ground that he colludes with the executor: *Graves v. Griffith*, 1 Jac. & Walk. 646; *Colverson v. Bloomfield*, 29 C. D. 341.

(z) 1 Dick. 30.

(a) 3 Atk. 409, 410.

(b) 3 Atk. 409; *S. C. nom. Ternegan v. Glass*, Ambl. 62; *S. C. nom. Jernegan v. Glass*, 1 Dick. 107.

(c) Madd. & G. 218.

(d) 1 Turn. & Russ. 96.

(e) *Re Turnbull*, [1900] 1 Ch. 180. It appears, from the decree in *Moore v. Meynell*, that the *feme covert* in that case had large separate property, and had executed bonds, &c. And Lord Eldon observed thereupon that there may be a very great difference between the case of a married woman who has separate property and the case of a married woman who is administratrix, and as administratrix can have no separate property at all: *Pannell v. Taylor*, 1 Turn. & Russ. 96, 103. See also *ante*, p. 1551. In *Re Turnbull*, [1900] 1 Ch. 180, Stirling, J., decided that if a married woman administratrix fails to comply with an order to pay into Court a sum of money belonging to the estate of the intestate, and shown by her account of the intestate's personal estate to be in her possession, the Court has jurisdiction to make an order for attachment against her, for the better securing of the fund. *Secus*, however, if the object is to compel her to make good a loss occasioned by her: *devastavit*.

(f) Madd. & G. 278.

granted against the wife, until an order had been obtained that she should answer separately, and that she must have notice of the motion for that order.

In general an order of *ne exeat* can only be issued for an equitable debt actually payable. It can, however, apparently also be issued for the balance of an account on which an action may be maintained, and for arrears of alimony decreed (*g*).

Defendant
can obtain
order of *ne
exeat*.

The application is made *ex parte* on affidavit (*h*).

The usual practice is to require the plaintiff to give an undertaking as to damages and to accept short notice of motion.

Practice on
application
for a writ
of *ne exeat*.

The defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such relief as may be just (*i*).

Generally speaking, the affidavit, on which the application for a *ne exeat regno* is grounded, must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail (*j*): but in the case of partners and executors, information and belief is held sufficient (*k*). The affidavit ought to swear, or aver to the best of the knowledge and belief of the deponent, that assets have come to the hands of the executor or administrator (*l*); and it should appear distinctly that he has a present intention to leave the country (*m*).

Affidavit in
support of
application.

The debt in respect of which a writ of *ne exeat regno* is sought must be actually due and payable and for an ascertained amount (*n*). The evidence of the debt must be positive and clear (*o*), as also the defendant's intention to leave the

Proof
required.

(*g*) *Whitehouse v. Partridge*, 3 Sw. 365; 19 R. R. 216, 218.

(*h*) R. S. C. Ord. LXIX. r. 1. As to furnishing copies of the affidavit to the defendant, see Ord. LXVI. r. 7 (*j*).

(*i*) R. S. C. Ord. LXIX. r. 1. And see, as to discharging the writ, Dan. Ch. Pr. 8th edit. p. 1446.

(*j*) *Jackson v. Petrie*, 10 Ves. 164; *Amsinck v. Barklay*, 8 Ves. 597.

(*k*) *Jackson v. Petrie*, 10 Ves. 164; *Rico v. Gualtier*, 3 Atk. 501. An affidavit founded on information and belief, which, under Ord. XXXVIII. r. 3, is admissible on interlocutory applications, must state the grounds of such belief. See the rule itself, and *Re J. L. Young Manufacturing Co.*, [1900] 2 Ch. 753.

(*l*) *Anon.* 2 Ves. Sen. 489. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*: *Howkins v. Howkins*, 1 Dr. & Sm. 75, 78.

(*m*) *Darley v. Nicholson*, 1 Dr. & W. 66; *Perry v. Dorset*, 19 W. R. 1048.

(*n*) *Colverson v. Bloomfield*, 29 C. D. 341; *Anon.*, 5 N. R. 358; *Flack v. Holm*, 1 J. & W. 405.

(*o*) *Perry v. Dorset*, 19 W. R. 1048.

country (*p*). The plaintiff must also clearly prove that he will be materially prejudiced in the prosecution of his claim by the defendant leaving the kingdom (*q*).

Before time
limited for
payment.

If the Court be satisfied that the defendant is going abroad to evade payment, it can make an order of *ne exeat*, although an order for payment has been made but the time for payment has not arrived (*r*).

Now limited
to cases fall-
ing within
sect. 6 of the
Debtors Act,
1869.

In *Drover v. Beyer* (*s*), Jessel, M. R., held that a writ of *ne exeat regno* is only to be issued in those cases which fall within sect. 6 of the Debtors Act, 1869. The case went to the Court of Appeal, and that Court decided the appeal on another point, and do not appear to have expressed any opinion on Sir George Jessel's view of sect. 6. In the later case of *Hands v. Hands* (*t*), Jessel, M. R., followed his decision in *Drover v. Beyer*.

Sect. 6 of
Debtors Act.

Sect. 6 of the Debtors Act, 1869 (*u*), provides as follows:—

“After the commencement of this Act a person shall not be arrested upon mesne process in any action.

“Where the plaintiff in any action in any of her Majesty's Superior Courts of Law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment, by evidence on oath to the satisfaction of a Judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such Judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

“Where the action is for a penalty or sum in the nature of a

(*p*) *Perry v. Dorset*, 19 W. R. 1048.

(*q*) *Drover v. Beyer*, 13 C. D. 242.

(*r*) *Sobey v. Sobey*, L. R. 15 Eq. 200; *Whitehouse v. Partridge*, 3 Sw. 365. But see *Colverson v. Bloomfield*, 29 C. D. 341, where the order was not served.

(*s*) 13 C. D. 243.

(*t*) 43 L. T. 750.

(*u*) 32 & 33 Vict. c. 62.

penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

The practice under sect. 6 of the Debtors Act, 1869, is now regulated by Ord. LXIX. of the Rules of the Supreme Court, 1883. Practice under Debtors Act.

The exercise of the power of arrest under the section is discretionary (*v*). Where the defendant is arrested under it, he can only be kept in prison until final judgment (*x*).

By sect. 4 of the Debtors Act it is provided that:—

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. Sect. 4, sub-s. 3, of Debtors Act.

"There shall be excepted from the operation of the above enactment

"(3) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control" (*y*).

In an action against an executor or administrator, other than an action for administration of the assets, costs are in the discretion of the Court or Judge (*z*). In such cases the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party: Accordingly, if an executor or administrator is sued in equity by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the Court will direct the payment of the amount due to the creditor, together with his costs, out of the estate (*a*), but unless the estate is insufficient, no order is made with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets; so that if there be no further fund out of Costs. General rule.

(*v*) *Hasluck v. Lehman*, 6 Times Rep. 435.

(*x*) *Hume v. Druyff*, L. R. 8 Ex. 214.

(*y*) The question of the liability of an executor to attachment under this sub-section will be found discussed, *ante*, p. 1599.

(*z*) R. S. C. Ord. LXV. r. 1.

(*a*) Dan. Ch. Pr. 8th edit. 1065.

which he may reimburse himself, the costs must come out of his own pocket (b).

Question of allowance of costs to executor out of his estate.

The question whether an executor or administrator who sues or defends, and is unsuccessful, is to be repaid his costs out of his estate, is totally distinct from the question whether he is liable to the other party to the action or not, and will be found dealt with later on in this chapter (c).

Costs in an administration suit:

But where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative, and distributed under the direction of the Court, his costs of suit, as between solicitor and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the creditors of the deceased, these costs, and any other costs, charges, and expenses properly incurred by him, continue the first charge on the estate (d).

of the executor, &c., out of the fund:

The above is the general rule, but it is governed by the circumstances of each particular case, and in cases marked by fraud, evasion, or neglect of duty, the Court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part (e); but

cases in which the executor, &c., has to pay costs personally.

(b) Dan. Ch. Pr. 8th edit. 1065.

(c) See *post*, p. 1652.

(d) *Tipping v. Power*, 1 Hare, 405, 411; *Gaunt v. Taylor*, 2 Hare, 413; *Dodds v. Tuke*, 25 C. D. 617; *ante*, p. 763; *Re Griffith*, [1904] 1 Ch. 807. As to the priority of the executor's costs of an administration action over costs in a probate action, see *Re Mayhew*, 5 C. D. 596; *Re Price*, 31 C. D. 485; and over a charging order obtained by plaintiffs' solicitors, see *Re Turner*, [1907] 2 Ch. 126. As to the priority of the executor's costs in a creditor's administration action where there is no personal estate, see *Re Pearce*, 56 L. T. 228; *Hibernian Bank v. Lauder*, [1898] 1 I. R. 262; *Re Samson*, 123 L. T. Jo. 86. In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate, the personal representatives are entitled, if the assets are deficient, to payment of their costs, charges, and expenses, in priority to the plaintiff's costs of the sale: *Re Spensley's Estate*, L. R. 15 Eq. 16. But see *Pinchard v. Fellows*, L. R. 17 Eq. 421.

(e) *Heighington v. Grant*, 1 Phil. Ch. C. 600; *Hide v. Haywood*, 2 Atk. 126; *Hewett v. Foster*, 7 Beav. 348; *Re England*, [1918] 1 Ch. 24. But see as to costs subsequent to decree, *Easton v. Landor*, W. N. (1892) 176. In *Re Skinner*, [1904] 1 Ch. 289, where proceedings for administration were rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees were ordered to pay all the costs, including the costs of taking and vouching the accounts. Farwell, J., at p. 293, says: "I think that the view expressed by Lord Langdale in *Hewett v. Foster*, as explained by the Court of Appeal in *Easton v. Landor*, was a correct

mere negligence is not sufficient to deprive an executor or administrator of his costs (f).

Rule 1 of Ord. LXV., which provides that the costs of all proceedings in the Supreme Court are in the discretion of the Judge, excepts from the general rule the case of an executor or administrator "who has not unreasonably instituted or carried on or resisted any proceedings," and provides that he is not to be deprived "of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (g).

An executor's or administrator's costs are not discretionary.

The effect of the rule may be stated to be that an executor or trustee is entitled to his costs (including costs, charges, and expenses) in any action to administer his estate unless it is established that he is guilty of such misconduct as justifies the Judge in depriving him of them (h).

It is, of course, impossible to define exactly what will amount to such misconduct; where executors first withheld accounts and then rendered incorrect ones they were ordered to pay the costs of the action (i), and mere non-feasance has been held to amount to such misconduct as in *Re Weall* (k), where executors allowed their solicitor to retain and pay himself some costs which the Court held to be unnecessary, and other costs which should have been charged against *corpus* but which the executors had improperly charged against income.

Misconduct.

In the case of *Re Cabburn* (l), Bacon, V.-C., ordered the plaintiff, who was executor and trustee of the Will, to personally pay the costs of an administration action which was held to be unnecessary. The estate in that case was a very small one,

Executor bringing a useless action.

statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as everyone interested in the estate had a right to have the accounts taken in court, the order for an account in an administration action went as a matter of course, and the costs of taking it came as a general rule out of the estate. But that is no longer the case. Since October 24th, 1883, there is no longer any such general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate." See also *Re Holton*, [1918] W. N. 78; Dan. Ch. Pr. 8th edit. p. 1060.

(f) *Travers v. Townsend*, 1 Moll. 496; but see *Re Skinner*, *supra*.

(g) Ord. LXV. r. 1.

(h) *Re Love*, 29 C. D. 348. See also *Re Knight's Will*, 26 C. D. 82.

(i) *Re Radcliffe*, 50 L. J. Ch. 317.

(k) 42 C. D. 674.

(l) 46 L. T. 848. As to an unnecessary action by a legatee, see *post*, p. 1662.

and the defendant beneficiaries had offered to concur in a special case to settle any point of doubt or difficulty arising under the Will.

Trustee
entitled to
solicitor and
client costs
unless
deprived by
misconduct.

A trustee is, in an administration action, always entitled to his costs as between solicitor and client, unless a case of misconduct is made out against him such as to justify the Judge in depriving him of them (*m*).

Costs as between solicitor and client are not usually given to an executor out of real estate, but where he has accounted for all the personal estate he may be paid his costs, charges, and expenses out of realty to the extent of the personal estate so accounted for, but the balance is only payable out of real estate as between party and party (*n*).

Appeal from
an order
refusing costs.

An order refusing a trustee his costs can always be appealed from (*o*), as he can only be deprived of them on the ground of misconduct, and the question of misconduct or no misconduct is a matter on which an appeal lies (*p*). But if the Judge fairly exercises his discretion as to the costs of an executor, administrator or trustee, no appeal will lie from his decision, by reason of sect. 49 of the Judicature Act, 1873. If, however, the Judge has merely applied some rule which in fact excluded his discretion, an appeal will lie (*q*).

Defaulting
trustee:

one of two
only default-
ing.

It is a clear rule that no costs are given to an executor or trustee who is a debtor to the estate until his debt is paid (*r*), or until he has complied with an order to bring in money, and his solicitor is in no better position (*s*). If one of two executors is a debtor to the estate, his co-executor is entitled to act by a separate solicitor, and if he does so he will be entitled to his costs (*t*). If two executors employ one solicitor, and one of the two executors is a debtor to the estate, the taxing-master

(*m*) *Re Love*, 29 C. D. 348. See also *Re Knight's Will*, 26 C. D. 82. And so an administrator, even though the action has been caused by a claim by him for certain payments disallowed in his accounts provided the claim was made under an honest mistake and was neither fraudulent nor monstrous: *Re Jones*, [1897] 2 Ch. 190.

(*n*) *Re Harrys*, [1900] W. N. 147.

(*o*) Dan. Ch. Pr. 8th ed. 1115, where the cases will be found conveniently cited.

(*p*) *Re Love*, *supra*. See also *Re Knight's Will*, *supra*.

(*q*) *The City of Manchester*, 5 P. D. 221; *Bew v. Bew*, [1899] 2 Ch. 467, disapproving *Charles v. Jones*, 33 C. D. 80, on this point.

(*r*) But this only applies to the fund in respect of which he is in default and not to a specific legacy to him: *Re Towndrow*, [1911] 1 Ch. 662.

(*s*) *Re O'Kean*, [1907] 1 Ir. R. 223.

(*t*) Jessel. M. R., in *Smith v. Dale*, 18 C. D. at p. 518.

on taxation finds what is the fair amount of costs to be attributed to the executor who is a debtor to the estate. This amount is deducted from the total costs of the two, and the balance after making such deduction is the amount allowed as costs of the other executor (*u*).

The principle seems to be that the costs due to the executor, who is indebted to the estate, are set off against his debt, and the proper form of order appears to be to order payment of the costs due to him from the estate, and for the order also to provide that such costs are not to be paid until he makes good the moneys due from him to the estate (*x*), and it makes no difference for this purpose whether the debt arises from a default of the executor or trustee, or is simply a debt due from him to the testator's estate.

Principle on which the costs of a defaulting trustee are disallowed.

If an executor who is indebted to the estate becomes bankrupt, his costs incurred prior to the bankruptcy are set off against the debt (*y*). The costs incurred subsequently to the bankruptcy stand on a different footing, and the question whether such costs will be paid out of the estate seems now to depend mainly on whether the debt due from the executor or trustee is discharged by the bankruptcy or not.

Costs of a defaulting executor who becomes bankrupt.

There are conflicting decisions on the point, one decision of Hall, V.-C. (*z*), and the other of North, J. (*a*).

Both cases arose under the Bankruptcy Act, 1869, in both cases the debt due from the defendant was a debt due in respect of a breach of trust, and by sect. 49 of the Bankruptcy Act, 1869, bankruptcy was not a discharge from a debt incurred by breach of trust. North, J., held that as the debt was not discharged the executor was not entitled to his costs incurred after the bankruptcy unless he paid the debt. Hall, V.-C., held the trustee entitled to the costs subsequently to the bankruptcy without making good his default, it seeming to him (as his Lordship stated) to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs (*b*).

(*u*) *Smith v. Dale*, 18 C. D. 516. See also *McEwan v. Crombie*, 25 C. D. 175.

(*x*) *Lewis v. Trask*, 21 C. D. 862; *Re Basham*, 23 C. D. 195.

(*y*) *Smith v. Dale*, *supra*; *Re Basham*, *supra*; *Re Fowles*, 32 C. D. 243.

(*z*) *Clare v. Clare*, 21 C. D. 865.

(*a*) *Lewis v. Trask*, 21 C. D. 862.

(*b*) 21 C. D. 867.

In the case of *Re Basham* (c), Chitty, J., after a very full consideration of the authorities, followed the decision of North, J., and both the last-named Judge and Pearson, J., acted on the same rule in later cases (d).

Sect. 28 of the
Bankruptcy
Act, 1914.

Under the Bankruptcy Act, 1914, s. 28, replacing sect. 30 of the Bankruptcy Act, 1883, a bankrupt executor, administrator, or trustee, only remains liable to the estate for debts incurred by fraudulent breach of trust. The consequence is, that where his debt is for a fraudulent breach of trust he will get no costs at all; if the debt arise on any other ground, he will get his costs subsequently to the bankruptcy.

Costs due to a trustee who has become bankrupt, whether incurred before or after bankruptcy, are payable to the trustee in bankruptcy; unless the solicitor of the trustee obtains a charging order in his favour (e).

Costs some-
times given to
a defaulting
trustee on
account of
assistance
rendered.

In meritorious cases, where the Court has derived assistance in taking the accounts from having the executor represented by solicitors and counsel in the action, it will sometimes order him to have costs out of the estate notwithstanding he remains a debtor to the estate (f), but the solicitor for the defaulting executor should, before incurring costs, point out to the beneficiaries that the executor can only attend and assist in the proceedings if his costs are paid out of the estate, and obtain their sanction to his attending on those terms before the costs are incurred.

Trustee
making good
his default:
right to costs.

A trustee who has not been guilty of dishonesty, and who has made good to the estate the deficiency arising from an improper investment made by him, will not be ordered to pay costs (g).

Executors'
and trustees'
priority as to
costs.

Where the estate is insufficient for payment of costs executors and trustees are entitled to payment of their costs, charges, and expenses, in priority to all other parties to an administration action (h), and such costs have priority over a solicitor's charging order (i).

Executor of a
defaulting
trustee.

The executor or administrator of a defaulting trustee, who accounts fairly for the assets come to his hands, is entitled to

(c) 23 C. D. 195.

(d) *McEwan v. Crombie*, 25 C. D. 175; *Re Vowles*, 32 C. D. 243.

(e) *Baker v. Abbott*, W. N. (1897) 38.

(f) See remarks of Chitty, J., in *Re Basham*, *supra*.

(g) *Peacock v. Colling*, 54 L. J. Ch. 743.

(h) *Dodds v. Tuke*, 25 C. D. 617.

(i) *Re Turner*, 95 L. T. 861, affirmed [1907] 2 Ch. 126.

deduct his costs of the action out of the assets of his testator or intestate, even although they may be insufficient to repair the breach of trust (*j*).

In the case of *Re Griffiths* (*k*), an action was brought against the executor of a deceased executor for the administration of the estate of the original testator. The defendant properly accounted for all assets which had come to his hands. A balance was found due from the estate of the original executor to the estate of the original testator, which balance the estate of the original executor was insufficient to pay. Cotton, L. J., said that the strict order would be to allow the defendant out of the estate of the original testator all the costs incurred solely with reference to the original testator's estate, but as to the costs incurred by the defendant solely as representative of his own testator, the defaulting executor, he ought to be allowed them solely out of the estate of the defaulting executor. Fry, L. J., in the same case, pointed out that there was a third class of costs, coming under neither of the above heads, and they ought to be divided between the two funds (*l*).

The following payments have been held to be included in costs, charges, and expenses: costs of proceedings by an administrator against a defaulting solicitor, taken *bonâ fide* for the benefit of the estate (*m*), the costs of an action properly defended by a trustee (*n*), costs of a sale rightly made by trustees under a power (*o*), costs of former trustees paid to the executor of the survivor in consideration of his transferring the trust property (*p*).

It was held by Jessel, M. R., in *Re Chennell* (*q*), that an order giving trustees their costs, charges, and expenses, gives them something more than their costs of the action, and therefore entitles them to appeal as to costs only. In *Charles v.*

(*j*) *Haldenby v. Spofforth*, 9 Beav. 195; *Horne v. Shepherd*, 3 Jur. N. S. 806.

(*k*) 26 C. D. 465.

(*l*) See also *Palmer v. Jones*, 43 L. J. Ch. 249; *Re Kitto*, 28 W. R. 411.

(*m*) *Re Davis*, 57 L. T. 755.

(*n*) *Walters v. Woodbridge*, 7 C. D. 504; *Re Llewellyn*, 37 O. D. 317, 327; *Re Dunn*, [1904] 1 Ch. 648, where an administrator was disallowed costs of defending an action which was not for the benefit of the estate.

(*o*) *Re Mansel*, 54 L. J. Ch. 883.

(*p*) *Harvey v. Olliver*, 57 L. T. 239.

(*q*) 8 C. D. 492.

Payments
allowed as
costs, charges,
and expenses.

Order giving
"costs,
charges, and
expenses."

Jones (*r*), however, a different view was taken by Cotton, L. J., and it was held by the Court of Appeal in *Bew v. Bew* (*s*), that the view of Cotton, L. J., was the right one.

“Moderation” of bill of costs.

A trustee in passing his accounts is not allowed without question sums paid by him to his solicitor for costs; and the bill, although not submitted to a regular taxation, can be submitted to the taxing-master to be “moderated,” *i.e.*, for the taxing-master to disallow such items as are irregular and excessive (*t*).

Costs of a solicitor-trustee.

A solicitor-trustee is only entitled to charge his costs and expenses out of pocket found by the taxing-master to have been properly incurred (*u*), unless he is specially authorized by the instrument creating the trust to make further charges (*v*), and although he be empowered to charge professional charges he is not entitled to charge for services which are not strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors (*w*); but where an executor was authorized to make the usual professional or other proper and reasonable charges he was held entitled to charge for business not strictly of a professional nature transacted by him in relation to the trust estate (*x*). A solicitor should not in a Will appointing him executor or trustee insert any authority to himself to charge for business not strictly professional, unless the testator has expressly instructed him to insert such a power (*y*).

Duty of a solicitor inserting a power in a Will authorizing him to charge.
Effect of the solicitor attesting the Will.

A power authorizing a solicitor-trustee to charge for professional services is inoperative if the solicitor himself attests the Will (*z*).

(*r*) 33 C. D. 80, 81—82.

(*s*) [1899] 2 Ch. 467, 472.

(*t*) *Johnson v. Telford*, 3 Russ. 477; *Allen v. Jarvis*, L. R. 4 Ch. 616; *Aylesford v. Poulett*, 63 L. T. 519; *Re Park*, 41 C. D. 326; *ante*, p. 1489.

(*u*) *Robinson v. Pett*, 2 Lead. Cas. Eq. 214, 6th edit.

(*v*) *Re Shearwood*, 2 Beav. 338; *Moore v. Frowd*, 3 M. & Cr. 45; *Re Wyche*, 11 Beav. 209.

(*w*) *Harbin v. Darby*, 28 Beav. 325; *Re Chalinder and Herington*, [1907] 1 Ch. 58.

(*x*) *Re Ames*, 25 C. D. 72. But see *Re Chapple*, 27 C. D. 584. And cf. *Re Fish*, [1893] 2 Ch. 413; *Clarkson v. Robinson*, [1900] 2 Ch. 722.

(*y*) *Kay, J.*, in *Re Chapple*, 27 C. D. 587.

(*z*) *Re Barber*, 31 C. D. 665; 34 C. D. 77; *Re Pooley*, 40 C. D. 1.

A solicitor who is the sole executor and trustee of a Will is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the Will contains a clause authorizing him to charge for work done as such solicitor (*a*).

A solicitor-trustee who acts as solicitor for other parties in an action will be allowed his costs, and this none the less that he acts for himself as well, unless and except so far as the costs are increased by acting for himself as well as the others (*b*); but this does not apply to his costs in the administration of the trusts outside a suit, the general principle that a trustee is not permitted to profit by his trust, or to place himself in a situation in which he may be tempted to deal with his trust with a view to his own profit, being held to apply to the latter case and not to the former (*c*). It is difficult to see the distinction between the two cases, and Chitty, J., and the Court of Appeal, in following (*d*) *Cradock v. Piper* (*e*), seem to have considered that the exception to the general rule made by *Cradock v. Piper* had been too long established to be disturbed (*f*).

A solicitor-trustee acting for other parties to the action.

After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it (*g*).

Of the plaintiff in the action out of the fund.

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt with a view to be reimbursed out of the fund in Court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs: that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him. Again, if the suit has been properly instituted and there are either assets in Court or outstanding assets to be administered, it seems to have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor

(*a*) *Re White*, [1898] 2 Ch. 217; and see *Re Brown*, [1918] W. N. 118, *ante*, p. 1484.

(*b*) *Cradock v. Piper*, 1 M. & G. 664; *Re Barber*, 34 C. D. 77. But see *Re Corsellis*, 34 C. D. 675; cf. *Vipont v. Butler*, W. N. (1893) 64.

(*c*) *Re Barber*, *supra*.

(*d*) In *Re Barber*, *supra*, and *Re Corsellis*, *supra*.

(*e*) 1 M. & G. 664.

(*f*) As to a solicitor-trustee employing his partner, see *Clack v. Carlton*, 30 L. J. Ch. 639; *Re Doody*, [1903] 1 Ch. 129, 134.

(*g*) *Hearn v. Wells*, 1 Coll. 323.

or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money (*h*).

But the personal representative's right of retainer for his own debt will prevail, as there has already been occasion to show (*i*), against the plaintiff's right to his costs.

Costs of person taking proceedings against an executor or administrator discretionary. No appeal from an order refusing a legatee costs.

The costs of a person (beneficiary or creditor) bringing proceedings against an executor or administrator are now always in the discretion of the Court (*k*), and an order refusing a beneficiary or creditor plaintiff his costs in an administration action, or making him pay costs, is an order within the discretion of the Judge, under Ord. LXV. r. 1, and cannot be appealed from (*l*).

Legatee plaintiff not entitled as of right to costs.

Prior to the Rules of 1883, the rule was that a residuary legatee filing a bill for administration had a right to have his costs out of the estate, unless that right was displaced by some special ground for depriving him of them (*m*).

Hostile actions against executors or trustees, for instance, an action seeking to charge them with costs on the ground of misconduct (*n*), did not come under the old rule.

Costs of beneficiary who has mortgaged his legacy.

Where a beneficiary has mortgaged his legacy or share one set of costs only is allowed to him and his incumbrancer attending the proceedings, that set of costs is payable to the incumbrancer so far as may be necessary to satisfy the incumbrancer's costs of action, and after such payment the balance of costs is payable to the plaintiff (*o*).

Creditor's right to solicitor and client costs.

A creditor bringing an administration action is entitled to solicitor and client costs if the estate proves insufficient for payment of the debts (*p*), at any rate where he sues on behalf of himself and the other creditors of the deceased (*q*), the reason given being that it would be unreasonable that the general body of creditors should take advantage of the exertions of the particular creditor through whose instrumentality the fund

(*h*) *Hearn v. Wells*, 1 Coll. 323, 332, 333.

(*i*) *Ante*, p. 797 *et seq.*

(*k*) See R. S. C. Ord. LXV. r. 1.

(*l*) *Re McClellan*, 29 C. D. 495.

(*m*) *Farrow v. Austin*, 18 C. D. 58.

(*n*) *Williams v. Jones*, 34 C. D. 120.

(*o*) For form of order, see order in *Thomson v. Wingrove*, Seton, vol. ii. p. 1497, 6th edit. See also *Re Goss*, W. N. (1884), p. 192.

(*p*) *Thomas v. Jones*, 1 Dr. & Sm. 134; *Re Roby*, [1916] W. N. 37.

(*q*) As to this, see *ante*, p. 1623.

has been recovered without paying him all his costs (*r*); and this rule applies equally to a creditor who obtains conduct of an action originally commenced by a legatee or next of kin (*s*).

A plaintiff in a legatee's administration action is entitled to costs as between solicitor and client only where the estate is sufficient to pay debts but insufficient to pay legacies in full (*t*); and it makes no difference that there has been a contest between the plaintiff and another legatee as to the proper mode of dividing the fund (*u*). Legatee plaintiff.

The principle that a creditor plaintiff against an insolvent estate is entitled to his costs as between solicitor and client was extended by Kay, J. (*x*), to the case of a separate creditor suing on behalf of himself and all the other creditors of the testator, the testator being one of a firm of traders. The testator's private estate was solvent, and the separate creditors were paid in full, but the estate of the firm was insolvent.

In the case of *Re Watson* (*y*), a residuary legatee who brought an action to establish his identity was allowed costs out of the estate.

By Ord. LV. r. 58, of the Rules of the Supreme Court, 1883, it is provided, that "a creditor who has come in and established his debt in the Judges' Chambers under any judgment or order shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Judge, unless he shall think fit to direct the taxation thereof: and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established" (*z*). Where the creditor fails to establish his debt, he may be ordered to Of creditors coming in under the decree :

(*r*) Jessel, M. R., in *Re Richardson*, 14 C. D. 611, 612. See also the reason given by Kindersley, V.-C., in *Thomas v. Jones*, *supra*.

(*s*) *Re Richardson*, *supra*.

(*t*) *Re Hervey*, 26 C. D. 179.

(*u*) *Re Wilkins*, 27 C. D. 703. See also *Henderson v. Dodds*, L. R. 2 Eq. 532, where the action was to administer the realty, there being no personalty.

(*x*) *Re McRea*, 32 C. D. 613.

(*y*) 53 L. J. Ch. 305.

(*z*) Usually a sum is named for costs of proof at the time the debt is allowed. The costs to be allowed to a creditor for proving his debt when it amounts to 20*l.* or upwards are in general 2*l.* 2*s.*, and where below that amount, a smaller fee according to circumstances. The plaintiff's costs are costs in the action: Dan. Ch. Pr. 8th edit. p. 907.

pay the costs of the inquiry consequent upon his claim, though he is not a party to the action (a).

The question out of what particular fund costs are to be paid scarcely comes within the scope of this Work, but it will perhaps be well to refer to the general principles governing the subject.

Whether the costs are to be paid out of the particular fund or out of the general estate.

Where next of kin, or other persons claiming as a class under the Will, succeed in establishing their title, their costs, as above defined, incurred in so doing, are paid out of the general estate before any apportionment of it takes place (b). So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his Will) and not by the legacy (c). But where a beneficiary claims adversely to other beneficiaries, and by an originating summons gets a question determined which but for this procedure would be the subject of an action commenced by writ, the unsuccessful party must pay the costs (d). So where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares: and the infants filed a bill for an account against the executors and the other residuary legatees, who, being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct; it was held, that the costs of the suit were payable out of the plaintiff's share alone (e). The rule has been laid down to be, that if the executors, admitting a legacy to be payable, sever it from the estate, and a dispute arises between the persons or some of the persons to whom the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs; *secus*, if the dispute arises between the persons claiming the legacy and the residuary legatee whether it is payable (f).

(a) *Hatch v. Searles*, 2 Sm. & G. 147; *Yeomans v. Haynes*, 24 Beav. 127. It appears that a special summons must be taken out to obtain payment: Dan. Ch. Pr. 8th ed. 908; and Dan. Ch. Forms, No. 1200.

(b) *Shuttleworth v. Howarth*, 1 Cr. & Ph. 228.

(c) *Wilson v. Squire*, 13 Sim. 212; *Re Hall-Dare*, [1916] 1 Ch. 272. See also *Jolliffe v. East*, 3 Bro. C. C. 25; *Ripley v. Moysey*, 1 Keen, 578; *Eyre v. Marsden*, 4 M. & Cr. 231.

(d) *Re Buckton*, [1907] 2 Ch. 406; *Re Halston*, [1912] 1 Ch. 435.

(e) *Mackenzie v. Taylor*, 7 Beav. 467; *Thompson v. Clive*, 11 Beav. 475; cf. *Hilliard v. Fulford*, 4 C. D. 389.

(f) *Att.-Gen. v. Lawes*, 8 Hare, 43, by Wigram, V.-C. See also *Re Gibbons' Will*, 36 C. D. 486; and cf. *Re Birkett*, 9 C. D. 576. Now, by Ord. LXV. r. 14B (R. S. O. Nov. 1893), the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such

Where the difficulty is occasioned by the ambiguous language of the testator the costs are costs of administration, and therefore payable out of residue, and Ord. LXV. r. 14B does not apply (*g*). Where there are no other assets, the costs must be paid out of the specific legacies *pari passu* (*h*). It is now settled that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate (*i*). Nor has this rule been altered or affected by the Land Transfer Act, 1897 (*k*). It would seem that where real estates are sold under a decree in an administration suit, the costs incurred by such sale will be payable out of the estates sold (*l*). If the costs of an administration suit are increased by its being also a suit for the execution of the trusts of a settlement, the Court has held that the additional costs must be borne by the settlement fund (*m*).

Administra-
tion of real
estate.

The costs of a suit for the administration of a testator's estate are payable out of the residue generally and not primarily out of a lapsed share, as there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and costs of the administration of the estate of the testator (*n*). And real estate which has descended to the testator's heir-at-law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under the provisions of the Will, is not liable to pay the costs of an action to administer the estate in priority to specifically devised and bequeathed freehold and leasehold estates (*o*).

It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. If a creditor plaintiff brings or continues an action after he has been

In what cases
the plaintiff
shall pay the
executor
costs.

legacy, money, or share, unless the Judge shall otherwise direct: *Re Vincent*, [1909] 1 Ch. 810; *Re Whitaker*, [1911] 1 Ch. 214. By Ord. LXV. r. 14D, the Judge in any probate action may direct out of what portion of the estate the costs shall be paid: *Re Vickerstaff*, [1906] 1 Ch. 762; *In the estate of Osment*, [1914] P. 129.

(*g*) *Re Hall-Dare*, [1916] 1 Ch. 272.

(*h*) *Bristow v. Bristow*, 5 Beav. 289; *Cookson v. Bingham*, 17 Beav. 262.

(*i*) *Re Middleton*, 19 C. D. 552; *Patching v. Barnett*, 51 L. J. Ch. 74; *Re Roper*, 45 C. D. 126; *Re Copland*, W. N. (1895) 137.

(*k*) *Re Jones*, [1902] 1 Ch. 92; *Re Betts*, [1907] 2 Ch. 149.

(*l*) *Barnwell v. Iremonger*, 1 Dr. & Sm. 242, 255.

(*m*) *Irby v. Irby*, 24 Beav. 525; *Skirrow v. Skirrow*, 17 W. R. 759.

(*n*) *Trethewy v. Helyar*, 4 C. D. 53; *Fenton v. Wills*, 7 C. D. 33; cf. *Re Jones*, *Jones v. Caless*, 10 C. D. 40.

(*o*) *Hurst v. Hurst*, 28 C. D. 159; and see *ante*. p. 1331.

correctly informed that there are no assets applicable to the payment of his debt, he will be ordered to pay the costs, wholly or from the time he receives the information (*p*). In *Robinson v. Elliott* (*q*), a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt; he, however, persisted in the suit; and the result of the account in the Master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted: And it was held, that the bill should be dismissed without costs as against the executrix.

Useless proceedings by a legatee.

Where the proceedings brought by a legatee are unnecessary or improper, he will not be allowed his costs out of the estate, as, for instance, where the plaintiff, a residuary legatee, suing by his next friend, sought to charge the defendant with costs on the ground of misconduct and failed in making out the misconduct (*r*); and the legatee will be ordered to pay the costs of such improper proceedings, as, for instance, the costs of taking unnecessary accounts (*s*), or an abortive attempt to remove a trustee (*t*); and the Court will not permit the costs occasioned by improper litigation or by negligent conduct of administration proceedings to be paid out of the estate (*u*).

In the case of *Ackers v. Ackers* (*x*), North, J., ordered a useless administration action to be stayed, and the plaintiff to pay the costs of the action; the defendant being at liberty to take out of the estate any costs in default.

(*p*) *Bluett v. Jessop*, Jacob, 240; *King v. Bryant*, 4 Beav. 460, 462; *Fuller v. Green*, 24 Beav. 217.

(*q*) 1 Russ. Ch. C. 599. See Dan. Ch. Pr. 8th ed. 1068.

(*r*) *Williams v. Jones*, 34 C. D. 120.

(*s*) *Croggan v. Allen*, 22 C. D. 101; *Re Blake*, 29 C. D. 913.

(*t*) *Fane v. Fane*, 13 C. D. 228.

(*u*) *Brown v. Burdett*, 40 C. D. 244.

(*x*) W. N. (1884), p. 82. See also *Re Ormston*, 58 L. T. 74; affirmed on appeal, 59 L. T. 594.

CHAPTER THE THIRD.

REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE
PROBATE DIVISION.

AN executor, upon taking probate, as well as an administrator on taking out letters of administration, makes oath that he will (amongst other things) render a true and just account of the estate and effects of the deceased whenever required by law so to do (*a*). An administrator under the Court of Probate Act, 1857 (*b*), must also give a bond conditioned (*inter alia*) to make a "just and true account" of his administration whenever required by law so to do (*c*).

An executor or administrator may be compelled to exhibit an inventory, and render an account of his administration of the personal estate of his testator or intestate in the Probate Division at the instance of a legatee or next of kin, or of a creditor (*d*); but neither an executor nor administrator can be cited by the Probate Division *ex officio* to account (*e*).

The subject of the making of an inventory by an executor or administrator, together with the various questions relating thereto, *e.g.*, the form and contents of the inventory (*f*), the cases in which, and the persons from whom, the Court will compel the exhibiting of an inventory, and the effect of lapse

(*a*) For forms of executors' and administrators' oaths, see Tristram and Coote's Probate Practice, 15th edit. p. 283.

(*b*) Sect. 81; *ante*, p. 429.

(*c*) For form of administration bond, see Tristram and Coote's Probate Practice, 15th edit. p. 822.

(*d*) This jurisdiction was preserved to the Court of Probate by sect. 23 of the Court of Probate Act, 1857. See *ante*, p. 203.

(*e*) In the case of *Bouverie v. Maxwell*, L. R. 1 P. & D. 272, it was decided that the Court of Probate had no jurisdiction to compel administrators who had taken out administration in an Ecclesiastical Court to file inventories and accounts in the Registry of the Court, as such inventories and accounts were by virtue of the 87th section of the Probate Act returnable only into the Court of Chancery. See *ante*, p. 433.

(*f*) *Ante*, p. 736.

of time in exhibiting the inventory (*g*) has been discussed in an earlier part of this Treatise.

In practice an inventory is invariably dispensed with, by order of the Judge or of a registrar given under r. 76 of the Rules in the Court of Probate, 1862, and a declaration of the estate of the deceased filed instead (*h*).

The executor or administrator shall be allowed, in the Probate Division, all his reasonable expenses, as well in law-suits as for other honest purposes: and this reasonableness of expenses is to be such, that he may receive thereby neither profit nor loss (*i*). And therefore he shall be allowed his expenses in secular Courts over and above such costs as were allowed there (*k*). It would seem that the decisions which have been elsewhere pointed out (*l*), respecting the accounts and allowances of executors or administrators in equity, would be regarded as authorities in those matters in the Probate Division also.

After the investigation of the account, if the Court finds it true and perfect, it shall pronounce for its validity; and in case all parties interested have been cited, such sentence shall be final, and the executor or administrator shall be subject to no further suit (*m*).

Suit for a legacy.

With respect to legatees and next of kin, they might formerly proceed against the executor or administrator in the Ecclesiastical Court to recover their legacies, or distributive shares under the statute (*n*).

Indeed, in respect of legacies, the cognizance of them in former times belonged exclusively to the Ecclesiastical jurisdiction; the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*o*).

20 & 21 Vict. c. 77, s. 23 : no suits for legacies to be entertained by the Court of Probate.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Courts has been transferred, shall entertain no suit for legacies (*p*).

(*g*) *Ante*, p. 738.

(*h*) *Ante*, p. 742.

(*i*) 4 Burn, E. L. 9th edit. 608.

(*k*) *Ibid*.

(*l*) *Ante*, p. 1479 *et seq.*

(*m*) 4 Burn, E. L. 9th edit. 609.

(*n*) *Glen v. Webster*, 2 Cas. temp. Lee, 31.

(*o*) *Deeks v. Strutt*, 5 T. R. 692.

(*p*) See *ante*, p. 203.

According to the Statute of Distributions, the Ecclesiastical Court had authority to enforce the distribution of an intestate's effects: And as the Act of Parliament contains no negative words, equity had, in this matter also, a concurrent jurisdiction with the Ordinary (*q*).

Suits by next of kin for a distribution.

But it is provided by the Court of Probate Act (20 & 21 Vict. c. 77, s. 23), that the Court of Probate, to which the jurisdiction of the Ecclesiastical Court was transferred, shall entertain no suits for the distribution of residue (*r*).

20 & 21 Vict. c. 77, s. 23: no suits for distribution of residues to be entertained by the Court of Probate.

Now by the Judicature Acts, the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice (*s*).

The Probate Division, in common with the other Divisions of the High Court of Justice, has power to grant injunctions and to appoint receivers by virtue of sect. 25 (sub-sect. 8) of the Judicature Act, 1873, by which it is provided that "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made: and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just: and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim or title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title: and whether the estates claimed by both or by either of the parties are legal or equitable."

Injunctions: Receivers.

If there is a *lis pendens* in the Probate Division the proper course is to apply to that Court; but if there is no *lis pendens* in the Probate Division that Court has no jurisdiction to appoint a receiver and the application must be made to the Chancery Division, if the assets are in danger, pending probate or grant

(*q*) *Matthews v. Newby*, 1 Vern. 133; Fonbl. Treat. Eq. B. 4, Pt. 2, Ch. 3, s. 2, note (*d*).

(*r*) See *ante*, p. 203.

(*s*) See *ante*, p. 204.

of letters of administration; but the proper person entitled to the grant should be before the Court on the application (*u*).

Injunction by
executor
against a co-
executor
before
probate.

In a case where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ against him, claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (*x*).

The entry of caveat followed by warning and appearance does not constitute a *lis pendens* enabling the Probate Division to appoint a receiver and administrator *pendente lite*. A writ of summons must be issued to constitute a *lis pendens* (*y*).

(*u*) *Re Henderson*, 2 Times Rep. 322; *Salter v. Salter*, [1896] P. 291; but see *Re Oakes*, [1917] 1 Ch. 230, *ante*, p. 1595.

(*x*) *In the goods of Moore*, 13 P. D. 36. The Court in this case followed the case of *Re Parker*, 54 L. J. Ch. 694, in which it was decided that by sect. 25, sub-sect. 8, of the Judicature Act, 1873, any Judge of the High Court is enabled to appoint a receiver of a deceased's estate (before grant of probate or administration) notwithstanding the absence of *lis pendens* in the Court of Probate; but that applications for any such order being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged. It does not decide that where there is no writ issued in an action a receiver will be appointed: *per* Lindley, L. J., *Salter v. Salter*, [1896] P. 291, 293. See also *ante*, p. 1595.

(*y*) *Salter v. Salter*, [1896] P. 291. Cf. *Moran v. Place*, *ibid.* 214; and see *ante*, p. 1595, n. (*n*).

CHAPTER THE FOURTH.

EQUITABLE REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS
IN THE COUNTY COURT.

BY stat. 51 & 52 Vict. c. 43, s. 67, it is enacted that the County Courts shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned; (that is to say,) Jurisdiction
of the
County Court
in equity.

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds.
2. For the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds.
5. Under the Trustees Relief Acts (*a*) or under the Trustee Acts (*b*), or under any of such Acts, in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

(*a*) The whole of the Trustees Relief Acts, 1847 and 1849 (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74), and also sect. 30 of the 22 & 23 Vict. c. 35, which enabled trustees and others to apply to the Court for assistance on any question relating to the management of the trust property, were repealed by the Trustee Act, 1893, and no similar provision was substituted in place of the last-mentioned section. See *ante*, p. 1538.

(*b*) Practically the whole of these Acts (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 65) were repealed by the Trustee Act, 1893, which does not in terms confer any jurisdiction on the County Courts. It is conceived, however, that, in so far as these Acts and the Trustees Relief Acts are substantially re-enacted by the last-mentioned Act, the County Courts still have jurisdiction up to 500*l.* in cases coming within the re-enacted provisions. See *ante*, p. 1538.

The section, having enumerated other actions and matters, proceeds:

"In all such actions or matters the Judge shall, in addition to the powers and authorities possessed by him, have all the powers and authorities, for the purposes of this Act, of a Judge of the Chancery Division of the High Court; and the treasurer, registrar, and high bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said division can discharge, either under the order of a Judge of the said division, or under the practice thereof, and all officers of the Courts shall, in discharging such duties, conform to any rules or orders made in that behalf under this Act."

Where
amount
exceeds the
jurisdiction of
County Court,
suit may be
remitted to
the Chancery
Division, &c.

By sect. 68, "If during the progress of any action or matter under the last preceding section it shall be made to appear to the Judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the Judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the Rules of the Supreme Court: Provided always, that it shall be lawful for any party to apply to a Judge of the said division at Chambers for an order authorizing and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which equitable jurisdiction is given by the said section; and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order" (c).

Transfer to
County Courts
of equitable
actions or
matters.

By sect. 69, "Where any action or matter is pending in the Chancery Division of the High Court which might have been commenced in a Court under this Act, it shall be lawful for any of the parties thereto to apply at Chambers to the Judge of the said division to whom the said action or matter is attached to have the same transferred to the Court or one of the Courts in which the same might have been commenced, and such Judge shall have power upon such application, or without such appli-

(c) *Sunderland v. Glover*, [1915] 1 K. B. 393. As to jurisdiction by consent of the parties, see sect. 114.

cation, if he shall think fit, to make an order for such transfer, and thereupon such action or matter shall be carried on in the Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court" (d).

By sect. 70, "Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise, upon trusts within the meaning of the Trustees Relief Acts, where the same do not exceed in amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, with the registrar of the Court within the district of which such persons or any of them shall reside, of an affidavit shortly describing according to the best of their knowledge, the instrument creating the trust, may, in the case of money, be paid into a post office savings bank established in the town in which the Court is held, in the name of the registrar of such Court, in trust to attend the orders of the Court, and upon such persons filing with the registrar the receipt or other document given to them by the officer of the said bank, the registrar shall record the same, and give to them an acknowledgment in such form as may be prescribed, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and, in the case of stocks or securities, may be transferred or deposited into or in the names of the treasurer and registrars of such Court, in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited: and for the above purposes all the powers and authorities of the High Court shall be possessed and exercised by the Courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order" (e).

Trustees may pay trust moneys or transfer stock and securities into County Court.

By sect. 74, "Except where by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of

Where action may be commenced.

(d) *Ante*, p. 1624. As to retransfer, see *General Estates Co. v. Beaver*, [1912] 2 K. B. 398.

(e) See Ord. XXXVIII. r. 9.

commencing the action or matter, or it may be commenced, by leave of the Judge or registrar, in the Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like leave, in the Court in the district of which the cause of action or claim wholly or in part arose."

In what
Courts pro-
ceedings in
equity shall
be taken.

By sect. 75, "The provisions of the next preceding section shall not apply to any of the following proceedings; but

"(2) Proceedings under the Trustee Acts, 1850 and 1852 (f), shall be taken in the Court within the district of which the persons making the application, or any of them, reside or resides:

"(3) Proceedings for the administration of the assets of a deceased person shall be taken in the Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode:

"Provided that if during the progress of any such proceedings it shall be made to appear to the Court that the same could be more conveniently heard in some other Court, it shall be competent for the Court to transfer the same to such other Court, and thereupon the proceeding shall be taken in such other Court" (g).

In action for
administra-
tion plaintiff
may ask that
only a certain
question may
be decided.

By County Court Rules, 1903, Ord. VI. r. 5 (formerly r. 6), "Where any person entitled to bring or maintain an action for the administration of the estate of any deceased person or the execution of any trust desires to submit for the determination of the Court any of the following questions or matters:

"(a) Any question affecting the rights or interests of any person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*:

"(b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others:

"(c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:

"(d) The payment into Court of any money in the hands of the executors or administrators or trustees:

(f) See *ante*, p. 1667.

(g) See sect. 84.

“(e) Directing the executors or administrators or trustees to do or to abstain from doing any particular act in their character as such executors or administrators or trustees:

“(f) The approval of any sale, purchase, compromise, or other transaction:

“(g) The determination of any question arising in the administration of the estate or trust:

he shall in his particulars specify concisely the question or matter upon which the decision of the Court is required: and that he is willing to renounce his right to an order for a general administration of the estate or trust.”

Any such question may be determined without general administration, under Ord. XXII. r. 14 (*h*). Partial administration.

By Ord. XXII. r. 15, “Upon an application for administration or execution of trusts by a creditor or beneficiary under a Will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Judge may, in addition to the powers already existing—

“(a) Order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings:

“(b) When necessary, to prevent proceedings by other creditors, or by persons beneficially interested, make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without the leave of the Judge in person” (*i*).

By Ord. XXII. r. 16, “In any action or matter in which an Injunction. injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any wrongful act or breach of contract of a like kind relating to the same property or right.

(*h*) This rule is substituted for the previous rule 11. See Ord. LV. r. 10.

(*i*) This rule was added by the Rules of 1903. See Ord. LV. r. 10a.

or arising out of the same contract; and the Judge may, in addition to giving judgment for such damages and costs as the plaintiff may be entitled to, grant the injunction, either upon or without terms, as may be just.

“An application under this rule may be made—

“(a) Before the trial or hearing, in which case it shall be made in accordance with Ord. XII. r. 6:

“(b) At or immediately after the trial or hearing, in which case the order, if any, shall be included in the judgment: or

“(c) Subsequently to judgment, in which case it shall be made in accordance with Ord. XII. r. 11, on notice supported by affidavit” (*k*).

Parties
aggrieved
may appeal.

By sect. 120 of the County Courts Act, 1888, “If any party in any action or matter shall be dissatisfied with the determination or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the Judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court” (*l*).

For the Orders and Rules made for the County Courts, and the procedure therein, the reader is referred to the Annual County Courts Practice.

(*k*) The last paragraph of this rule was added by the Rules of 1903.

(*l*) See Ord. LIX. rr. 10—17.

APPENDIX.

THE LAND TRANSFER ACT, 1897.

(60 & 61 VICT. c. 65.)

PART I.

Establishment of a Real Representative.

1.—(1.) “Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives (*a*) or representative (*b*) from time to time as if it were a chattel real vesting in them or him (*c*). Devolution of legal interest in real estate on death.

(2.) “This section shall apply to any real estate over which a person executes by Will a general power of appointment, as if it were real estate vested in him (*d*).”

(3.) “Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (*e*).”

(4.) “The expression ‘real estate,’ in this part of this Act,

(*a*) It was formerly held that the executors who had proved the Will had no power to convey the legal estate without either the concurrence of or disclaimer by the other executor who had not proved: *Re Pawley and London & Provincial Bank*, [1900] 1 Ch. 58. But by the Conveyancing Act, 1911, s. 12, a sale of real estate can now be made by the proving executors alone without the authority of the Court. Further, general executors of the testator’s real estate in England can sell and make a good title without the concurrence of special executors appointed of property situate in a foreign country or in the colonies: *Re Cohen’s Executors and London County Council*, [1902] 1 Ch. 187.

(*b*) Section 24 (2) provides “In this Act, the expression ‘personal representative’ means an executor or administrator.”

(*c*) The legal estate vested in executors by the Act is sufficient to support contingent remainders: *Re Robson*, [1916] 1 Ch. 116.

(*d*) Cf. *ante*, p. 1293, as to the exercise of a general power of appointment over a fund.

(*e*) *Ante*, p. 300.

shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*f*).

(5.) "This section applies only in cases of death after the commencement of this Act (*g*).

Provisions as
to administra-
tion.

2.—(1.) "Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees (*h*) for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*i*).

(2.) "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real (*k*), and as respects the dealing with chattels real before probate or administration (*l*), and as respects the payment of costs of administration and other matters in relation to the administration of personal estate (*m*), and the powers, rights, duties and liabilities of personal representatives in respect of personal estate (*n*), shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate (*o*).

(3.) "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained

(*f*) See Watkins on Copyholds, 4th edit. by Coventry, vol. i. p. 58, note (1).

(*g*) Section 25 provides that the Act shall come into operation on the 1st January, 1898.

(*h*) As to what extent executors or administrators are considered trustees, see *ante*, p. 1590.

(*i*) See *ante*, pp. 1106, 1194.

(*k*) *Ante*, p. 517 *et seq.*

(*l*) *Ante*, p. 213 *et seq.*

(*m*) *Ante*, pp. 1534, 1649.

(*n*) *Ante*, p. 688 *et seq.*

(*o*) But see now Conveyancing Act, 1911, s. 12, *supra*. An executor has an absolute power of sale and can sell surface and minerals separately: *Re Cavendish and Arnold*, [1912] W. N. 83.

shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies (*p*).

(4.) "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate (*q*).

3.—(1.) "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay (*r*), all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance (*s*).

Provision for transfer to heir or devisee.

(2.) "At any time after the expiration of one year from the

(*p*) The settled practice of the Chancery Division, as stated in *Re Middleton*, 19 C. D. 552, that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate, has not been altered or affected by this Act: *Re Jones*, [1902] 1 Ch. 92. Nor does this Act confer any new right of retainer or priority in favour of the personal representative as against real assets: *Re Williams*, [1904] 1 Ch. 52. The Act has rendered it unnecessary for a testator to direct his real estate to be charged with the payment of his debts. But such a direction is not nugatory and will be given effect to by marshalling: *Re Kempster*, [1906] 1 Ch. 446; and it has the effect of bringing the debts within the Real Property Limitation Act, 1874, s. 8: *Re Balls*, [1909] 1 Ch. 791.

(*q*) *Ante*, pp. 324, 326.

(*r*) Where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which the executors had no notice at the date of the conveyance to the devisees: *Re Cary and Lott's Contract*, [1901] 2 Ch. 463; *ante*, p. 1195.

(*s*) As to assent by executors, see *ante*, p. 1102.

death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) "Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them, unless the transfer is for valuable consideration.

(4.) "The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorize the registrar to register the person named in the assent as proprietor of the land.

Appropriation of land (t) in satisfaction of legacy or share in estate.

4.—(1.) "The personal representatives of a deceased person may, in the absence of any express provision to the contrary, contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court (u).

(2.) "Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or

(t) This section applies to personal estate as well as real estate: *Re Beverly*, [1901] 1 Ch. 681, *ante*, p. 1196.

(u) As to appropriation and the effect of this section, see *ante*, p. 1196.

towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) "In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorize the registrar to register the person to whom the property is appropriated as proprietor of the land.

5. "Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof." ^{Liability for} ^{duty.}

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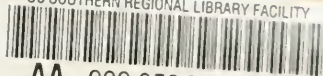
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